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A Twenty-First-Century Olympic and Amateur Sports Act

Dionne L. Koller

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A Twenty-First-Century Olympic and Amateur Sports Act

Dionne L. Koller*

ABSTRACT

Recent scandals involving national governing bodies for sport and allegations of athlete abuse have captured media attention. The most recent, focusing on the actions of USA Gymnastics, prompted Congress to propose legislation to require better protections for Olympic Movement athletes. Signed into law on February 14, 2018, the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017 designates the United States Center for SafeSport (SafeSport) as the independent organization charged with exercising jurisdiction over the United States Olympic Committee (USOC) and sport national governing bodies to safeguard amateur athletes against all forms of abuse. Congress's instincts in this regard are admirable, and the empowerment of SafeSport is critically important. However, this Article asserts that the issue targeted by the recently enacted legislation must be viewed in the context of the overall regulation of Olympic and amateur sport in the United States. In doing so, Congress should consider more comprehensive reform that goes beyond the issue of athlete abuse. Instead, Congress should further amend the Ted Stevens Olympic and Amateur Sports Act, the statute establishing the USOC and regulating the US Olympic program, to address the new realities of Olympic and amateur sport in the United States.

Specifically, this Article asserts that the statute should be amended to require reforms in three areas: athlete health and well-being, whistleblowing, and gender equity in the US Olympic program. In addition, this Article argues that Congress should enact a true amateur sports act, with a primary feature being the creation of an entity charged with developing an agenda and reforms for youth and amateur (non-Olympic) sports.

* Professor of Law and Director, Center for Sport and the Law, University of Baltimore School of Law. I would like to thank Genevieve Hornik for outstanding assistance with research.

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I. INTRODUCTION

USA Gymnastics is a national governing body (NGB) for US sport that has enjoyed considerable Olympic success.¹ Yet, while it was producing wins on the international stage, it was allegedly not doing enough to address numerous accusations that gymnasts were sexually abused by team doctor Larry Nassar.² Dozens of gymnasts, including some from Michigan State University, where Nassar also served as a team physician, accused Nassar of assaulting them under

1. See *About USA Gymnastics*, USA GYMNASTICS, https://usagym.org/pages/aboutus/pages/about_usag.html [<https://perma.cc/HUW7-DH9L>] (last visited Mar. 17, 2018); *U.S. Medalists at Olympic Games- Men & Women Artistic Gymnastics*, USA GYMNASTICS, https://usagym.org/pages/pressbox/history/olympics_medalists_artistic.html [<https://perma.cc/4Z3B-S7W9>] (last visited Mar. 17, 2018); see also U.S. OLYMPIC COMM., *QUAD REPORT 2* (2017) [hereinafter *QUAD REPORT*].

2. See Will Hobson & Steven Rich, *An Athlete Accused Her Coach of Sex Abuse. Olympic Officials Stayed on the Sideline.*, WASH. POST (Feb. 14, 2017), https://www.washingtonpost.com/sports/olympics/an-athlete-accused-her-coach-of-sex-abuse-olympic-officials-stayed-on-sideline/2017/02/14/35a6fc76-d2eb-11e6-a783-cd3fa950f2fd_story.html?utm_term=.7e1cb03c4494 [<https://perma.cc/F3Y7-MXEQ>].

the guise of providing medical treatment.³ Nassar pleaded guilty and was sentenced to sixty years in prison on federal child pornography charges.⁴ A Michigan court also sentenced Nassar to 40–175 years for criminal sexual conduct, and civil claims against Nassar are still pending.⁵

Sadly, reports of child sexual abuse in the sport setting are not new. A few years ago, USA Swimming was under fire for not doing enough to protect young athletes from predatory coaches.⁶ Other sport NGBs have also been accused of not taking adequate measures to protect their athletes.⁷ In response, the United States Olympic Committee (USOC) convened a working group that ultimately resulted in the creation of the United States Center for SafeSport (SafeSport), which seeks to address a range of harmful behaviors involving athletes—including bullying, hazing, emotional abuse, and sexual misconduct.⁸ As they do now, members of Congress demanded

3. See Will Hobson, *Larry Nassar, Former USA Gymnastics Doctor, Sentenced to 40-175 Years for Sex Crimes*, WASH. POST (Jan. 24, 2018), https://www.washingtonpost.com/sports/olympics/larry-nassar-former-usa-gymnastics-doctor-due-to-be-sentenced-for-sex-crimes/2018/01/24/9acc22f8-0115-11e8-8acf-ad2991367d9d_story.html?utm_term=.82fdaf361078 [https://perma.cc/E23D-VP MV]; Rick Maese, *USA Gymnastics Inaction Leads to Bill Establishing Protocol for Reporting Sexual Abuse*, WASH. POST (Feb. 19, 2017), https://www.washingtonpost.com/sports/usa-gymnastics-inaction-leads-to-bill-establishing-protocol-for-reporting-sexual-abuse/2017/02/19/138e59b8-f6ef-11e6-be05-1a3817ac21a5_story.html?utm_term=.244661405371 [https://perma.cc/B5ZP-2QBC].

4. Tracy Connor & Sarah Fitzpatrick, *Gymnast Maggie Nichols Was First to Report Abuse by Larry Nassar*, NBC NEWS (Jan. 9, 2018, 6:33 PM), <https://www.nbcnews.com/news/us-news/gymnast-maggie-nichols-was-first-report-abuse-larry-nassar-n836046> [https://perma.cc/UU5U-TK69].

5. See Eric Levenson, *Larry Nassar Sentenced to Up to 175 Years in Prison for Decades of Sexual Abuse*, CNN (Jan. 24, 2018, 9:29 PM), <https://www.cnn.com/2018/01/24/us/larry-nassar-sentencing/index.html> [https://perma.cc/K2TQ-GKU6]; Dan Murphy, *Male College Gymnast Joins Civil Lawsuit Against Larry Nassar*, ESPN (Mar. 2, 2018), http://www.espn.com/college-sports/story/_/id/22624061/male-college-gymnast-joins-civil-lawsuit-larry-nassar, [https://perma.cc/4Y8G-3NW5].

6. Nancy Armour & Rachel Axon, *USOC Did Not Heed Sexual Abuse Warnings in 2004, 2005*, USA TODAY (Mar. 31, 2017, 6:16 PM), <https://www.usatoday.com/story/sports/olympics/2017/03/31/usoc-sexual-abuse-usa-swimming-senate/99826600/> [https://perma.cc/9Z23-NB75].

7. Hobson & Rich, *supra* note 2 (“Under the USOC’s watch, six Olympic sport governing bodies have been beset over the years by allegations of mishandled complaints of abuse . . .”).

8. See Rachel Axon, *Bill Would Make U.S. Center for SafeSport Eligible for Federal Funding*, USA TODAY (June 23, 2017, 4:43 PM), <https://www.usatoday.com/story/sports/olympics/2017/06/23/senate-bill-would-give-u-s-center-safesport-financial-independence/424100001/> [https://perma.cc/48LW-E9WG]; *Who We Are*, SAFESPORT, <https://safesport.org/who-we-are> [https://perma.cc/E3CU-T73P] (last visited Mar. 27, 2018); see also Will Hobson, *Government Probe of Sex Abuse Prevention in Olympic Sports Went Nowhere*, WASH. POST, (Feb. 20, 2017), <https://www.washingtonpost.com/sports/olympics/government-probe-of-sex->

answers, and in 2015 the Government Accountability Office (GAO) produced a report outlining the patchwork of practices and policies that aim to prevent and adequately respond to sexual abuse of young athletes.⁹ Nevertheless, the problem persists.

The allegations involving USA Gymnastics spurred legislative change—at least in the context of Olympic Movement sport. Congress passed legislation that establishes new reporting requirements and expands the obligations of NGBs with respect to preventing and responding to sexual abuse of amateur athletes.¹⁰ The reforms amend the Ted Stevens Olympic and Amateur Sports Act¹¹ (the “Amateur Sports Act”), the law that established the modern US Olympic Movement structure and the USOC’s obligations. Amending the Amateur Sports Act to require that NGBs like USA Gymnastics have stronger policies both to prevent athlete abuse and to ensure better handling of allegations of abuse is without question important. The original statute was (and continues to be) mostly aimed at empowering the USOC to field high-quality Olympic teams and ensuring that athletes and others are provided with procedures for the swift and appropriate resolution of disputes affecting an athlete’s ability to compete.¹² There were also concerns that the Amateur Sports Act actually worked to prevent the USOC and NGBs from effectively responding to athlete abuse.¹³

However, the issue involving USA Gymnastics serves as an important reminder of the way youth and amateur sport is structured in the United States, and how government reluctance to regulate amateur sport can create the types of gray areas that have resulted in a variety of harms to young athletes. The recently enacted legislation to address the issue of athlete abuse therefore presents an important opportunity to think even more broadly about the Amateur Sports Act and modernize it to reflect the changing nature of the issues facing US

abuse-prevention-in-olympic-sports-went-nowhere/2017/02/20/75c8b0a6-d287-11e6-9cb0-54ab630851e8_story.html?utm_term=.f76bf6edf5f4 [https://perma.cc/WR5H-S67Y].

9. U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-418, YOUTH ATHLETES: SPORTS PROGRAMS’ GUIDANCE, PRACTICES, AND POLICIES TO HELP PREVENT AND RESPOND TO SEXUAL ABUSE 1–3 (2015).

10. Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, 132 Stat. 318 (2018) (codified at scattered sections of 18, 34, and 36 U.S.C.).

11. Ted Stevens Olympic and Amateur Sports Act, Pub. L. No. 105-225, 112 Stat. 1253, 1466–78 (1998) (codified as amended at 36 U.S.C. §§ 220501–29 (2012)).

12. See 36 U.S.C. § 220503 (2012). There is confusion over this provision that reportedly hindered NGBs in their ability to aggressively react to allegations of sexual abuse. See Hobson & Rich, *supra* note 2.

13. Hobson & Rich, *supra* note 2 (explaining that interpretations of the Amateur Sports Act have “played a central role in the USOC’s historic inaction on child protection”).

Olympic and youth sport.¹⁴ Doing so would not only ensure better prevention and handling of athlete abuse but also could more clearly define the purpose of the US Olympic Movement within the overall landscape of amateur sport.

To that end, this Article makes several recommendations for updating the Amateur Sports Act to more closely align it with the realities of Olympic and amateur sports today. First, Congress should further amend the Amateur Sports Act to adopt provisions for the Olympic Movement that aim to enhance athlete health and well-being, not only to prevent athlete abuse but also in the area of concussion management, coaching, and sports medicine. Congress should also require the USOC and NGBs to provide clearer and wider protections for all types of whistleblowers. Finally, Congress should require the USOC and NGBs to have a stronger commitment to gender equity.

Congress should also modernize the Amateur Sports Act by reconceiving the “pyramid” structure underlying the Olympic pipeline. Specifically, Congress should statutorily acknowledge the differences between high-performance, elite, Olympic sport (to which most provisions of the Amateur Sports Act are aimed) and true youth, amateur sports—addressing each context separately. In 1978, when Congress first enacted the Amateur Sports Act, the most pressing issue in amateur sport was thought to be elite athletes’ access to the Olympic Games.¹⁵ Today, the issue in amateur sport is simply access to grassroots recreational participation opportunities.¹⁶ Congress could begin to address this issue by no longer statutorily allocating the role of developing youth sports opportunities to the USOC.¹⁷ Instead, Congress should create an entity to address the non-Olympic amateur sport context and acknowledge the USOC’s primary focus on high-performance Olympic sport. As explained below, these changes would go a long way toward creating a transformative, twenty-first-century Olympic and amateur sport policy.

14. See Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, 132 Stat. at 318. This Article will not examine the potential role for government regulation of intercollegiate sports. While sport in that context is deemed “amateur,” the issues are far different than those presented by the youth and Olympic Movement sport “pyramid” that is the subject of this writing.

15. See, e.g., Amateur Sports Act of 1978, Pub. L. No. 95-606, § 114, 92 Stat. 3045, 3049–50 (1978), *amended by* Ted Stevens Olympic and Amateur Sports Act, Pub. L. No. 105-225, § 220505, 112 Stat. 1253, 1468 (1998) (codified as amended at 36 U.S.C. § 220504 (2012)).

16. See PROJECT PLAY, ASPEN INST., SPORT FOR ALL PLAY FOR LIFE: A PLAYBOOK TO GET EVERY KID IN THE GAME 22 (2015), <https://www.aspeninstitute.org/publications/sport-all-play-life-playbook-get-every-kid-game/> [<https://perma.cc/S6UE-3SC5>].

17. See 36 U.S.C. § 220521 (authorizing the USOC to recognize one amateur sport organization per sport as an NGB).

Part II of this Article provides background on the regulation of Olympic and amateur sport in the United States. That Part details the free market structure of US sport, which is regulated largely through private actors organized around different sport contexts with no overall public policy coordination: grassroots youth, interscholastic, intercollegiate, professional, and Olympic. Part II also explains how US Olympic Movement sport fits into the international sport structure and how US participation in elite, international sport is facilitated through the Amateur Sports Act.

Part III of this Article recommends that Congress should go beyond addressing athlete abuse and suggests additional updates to the Amateur Sports Act for Olympic Movement athletes, including promoting athlete health and well-being and adding greater protections for whistleblowers and stronger requirements for gender equity. Part III also makes the case that Congress should develop a true Amateur Sports Act and adopt reforms aimed at creating more grassroots sport opportunities.

II. BACKGROUND: THE REGULATION OF OLYMPIC AND AMATEUR SPORT IN THE UNITED STATES

To begin, it is important to understand the Amateur Sports Act within the greater US sport context. US sport, at all levels, exists in an environment characterized by limited government regulation but a strong political and popular desire to win in international competition.¹⁸ Congress conceived of the US Olympic Movement as a pyramid structure,¹⁹ with so-called “grassroots” youth sport opportunities at the base and elite, Olympic sport at the apex.²⁰ Each level of the pyramid is accessed through the opportunities provided by the private sector and, in some cases, schools.²¹ In addition, a

18. PRESIDENT’S COMM’N ON OLYMPIC SPORTS, FIRST REPORT TO THE PRESIDENT 4, 7 (1976) (stating that in international competition, “Winning is important How well we do is a reflection of our national spirit and purpose.”).

19. *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce & Tourism of the S. Comm. on Commerce, Sci. & Transp.*, 104th Cong. 44 (1995) [hereinafter *Hearing on the Amateur Sports Act*] (statement of Richard Schultz, Executive Director, United States Olympic Committee).

20. *Id.* at 2 (statement of Sen. Ted Stevens, Member, S. Subcomm. on Consumer Affairs, Foreign Commerce & Tourism); see also Will Hobson & Steven Rich, *Every Six Weeks for More Than 36 Years: When Will Sex Abuse in Olympic Sports End?*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/sports/every-six-weeks-for-more-than-36-years-when-will-sex-abuse-in-olympic-sports-end/2017/11/17/286ae804-c88d-11e7-8321-481fd63f174d_story.html?utm_term=.dedc8d5c2dd5 [https://perma.cc/9S9Q-PUFZ].

21. See HANDBOOK ON INTERNATIONAL SPORTS LAW 94–96 (James A.R. Nafziger & Stephen F. Ross eds., 2011).

significant international regulatory scheme, as well as US values, influences the structure of the US Olympic program. As explained below, this structure shapes both the outcomes and challenges for the modern US Olympic Movement and the grassroots programs that feed it.

A. The Structure of Olympic and Amateur Sport in the United States

US amateur sport generally occurs in several contexts.²² Offerings at the grassroots level are through private clubs and leagues.²³ Other opportunities are accessed through schools, frequently at the high school level.²⁴ The United States also provides higher quality sport opportunities at the college and university level.²⁵ Elite sport opportunities are provided through professional leagues and the US Olympic program.

These differing contexts for sport participation are not the product of an overall sport policy agenda but are largely a result of the free market.²⁶ The general consensus among policymakers is that the government should stay out of sport.²⁷ Certainly there is a significant amount of law that *applies* to sport.²⁸ There is, however, relatively little direct regulation of sport—especially at the amateur, youth

22. See PRESIDENT'S COMM'N ON OLYMPIC SPORTS, *supra* note 18, at 17 ("The structure for amateur sports . . . in the United States is ill-defined.").

23. See Brian L. Porto, *Youth and High School Sports Law Issues*, in THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW 345–47 (Michael A. McCann ed., 2018).

24. See NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2016–17 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY (2017), http://www.nfhs.org/ParticipationStatistics/PDF/2016-17_Participation_Survey_Results.pdf [<https://perma.cc/AHT8-T3CC>]; see also PRESIDENT'S COMM'N ON OLYMPIC SPORTS, *supra* note 18, at 60 ("Few countries have utilized the primary and secondary school system as the backbone of sports programming and instruction for youth as it is done in this country.").

25. See, e.g., Marc Cugnon, *A Hop Across the Pond: Comparing European vs. American College Experiences*, USA TODAY (Aug. 27, 2015), <http://college.usatoday.com/2015/08/27/europe-vs-united-states-college-experience/> [<https://perma.cc/5KLJ-AT3V>].

26. PRESIDENT'S COMM'N ON OLYMPIC SPORTS, *supra* note 18, at 5 ("[T]he free enterprise system has allowed a multitude of amateur sports organizations to flourish in this country . . .").

27. See Dionne L. Koller, *Putting Public Law into "Private" Sport*, 43 PEPP. L. REV. 681, 687–88 (2016); see also *Hearing on the Amateur Sports Act*, *supra* note 19, at 89 (statement of Tom McMillen, Co-Chair, President's Council on Physical Fitness and Sports) ("I believe we need to look at the attitude, the idea that laissez-faire is really the right answer here. I am opposed to Government intervention in sports, but I do not think what we have right now is the right balance, either.").

28. See Dionne L. Koller, *Sports, Doping, and the Regulatory "Tipping Point"*, 26 MARQ. SPORTS L. REV. 181, 183–87 (2015) (explaining that much of the law aimed at sport leagues is welcomed, or enacted on behalf of, the leagues).

level.²⁹ One notable exception is the Amateur Sports Act, which established the modern version of the USOC and set basic standards for the operation of the US Olympic Movement.³⁰ Along with the Amateur Sports Act is Congress's recognition of and appropriations for the United States Anti-Doping Agency (USADA).³¹ These initiatives, however, are consistent with Congress's instinct to stay out of sports,³² as the legislation reinforces the private status of the USOC and the USADA and enables them to flourish as independent corporations.³³ It also allows the USOC to set priorities for amateur sport in the United States—such as winning Olympic medals over broad-based, grassroots sports participation—largely unhampered by other public policy goals.³⁴ Moreover, in both cases, law was used to insulate as much as possible the USOC and the USADA from judicial intervention, at least with respect to managing athletes. For instance, courts have held that the USOC and USADA are not state actors.³⁵ In addition, Congress has limited the ability of athletes to bring a claim against the USOC.³⁶

29. Koller, *supra* note 27, at 685. This Article does not include college and university sport in the discussion of amateur sport, as that context is currently regulated through the National Collegiate Athletic Association. *See generally id.*

30. *See* Amateur Sports Act of 1978, Pub. L. No. 95-606, § 105, 92 Stat. 3045, 3047 (1978), *amended by* Ted Stevens Olympic and Amateur Sports Act, Pub. L. No. 105-225, § 220505, 112 Stat. 1253, 1468–69 (1998) (codified as amended at 36 U.S.C. § 220505 (2012)).

31. *See* 21 U.S.C. §§ 2001, 2003 (2012).

32. *See* Genevieve F.E. Birren & Robyn Lubisco, *Whatever Happened to the International Convention Against Doping in Sport: The United States Ratified It, But Then What?*, 13 DEPAUL J. SPORTS L. 1, 2 (2017) (stating that the government “takes little to no active role” in regulating doping compliance).

33. *See* DeFrantz v. U.S. Olympic Comm., 492 F. Supp. 1181, 1183 (D.D.C. 1980); Dionne L. Koller, *From Medals to Morality: Sportive Nationalism and the Problem of Doping in Sports*, 19 MARQ. SPORTS L. REV. 91, 118 (2008).

34. *See* Hobson & Rich, *supra* note 2 (“The law gave the USOC wide-ranging responsibilities, such as promoting racial equality, gender equality, and ‘sports safety.’ USOC leadership historically has taken a focused view of its missions, though. ‘For us, it’s all about medals,’ CEO [Scott] Blackmun said in 2014.”).

35. *See, e.g.,* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 547 (1987); DeFrantz, 492 F. Supp. at 1194; *see also* Jenna N. Rowan, Note, *Equal Protection for Equal Play: A Constitutional Solution to Gender Discrimination in International Sports*, 20 VAND. J. ENT. & TECH. L. 919, 922 (2018). *But see* Armstrong v. Tygart, 886 F. Supp. 2d 572, 581 n.18 (W.D. Tex. 2012) (assuming the USADA and USA Cycling are government actors subject to the Constitution but acknowledging that might not be the case).

36. 36 U.S.C. § 220505(b)(9) (2012) (providing that the USOC may be sued, but that any civil suit brought under the Amateur Sports Act “shall be removed” to federal court, and that “neither this paragraph nor any other provision of this chapter shall create a private right of action”).

Even less government attention is directed to youth sport.³⁷ Unlike most countries that participate in international sport, the United States does not have a “sports ministry,” national sport policy, or other similar government coordination or agency to promote and regulate youth and amateur athletics.³⁸ In this context, the federal government’s primary role has been to simply encourage physical fitness but not to otherwise develop opportunities or address barriers to participation. For instance, President Eisenhower created the President’s Council on Youth Fitness in 1956 in response to reports on the poor state of youth physical fitness in the United States.³⁹ The goal was for the Council to be a “catalytic agent” focused on creating public awareness of the benefits of youth physical fitness.⁴⁰ President Johnson subsequently changed the name to the President’s Council on Physical Fitness and Sports to encourage greater youth fitness through participation in sport.⁴¹ The Nixon administration established the Presidential Sports Award to motivate participation in physical activity.⁴² Subsequent administrations have continued to promote awareness and involvement in youth sport to enhance physical fitness;⁴³ in 2002, President Bush issued an Executive Order directing the Department of Health and Human Services (HHS) to “develop and coordinate” a national program to stimulate sport participation and physical fitness.⁴⁴ The goals of the President’s

37. See SI Wire, *Study Shows Major Drop in American Youth Sports Participation*, SPORTS ILLUSTRATED (Aug. 11, 2015), <https://www.si.com/more-sports/2015/08/11/american-youth-sports-participation-drop-decline-statistics-study> [<https://perma.cc/UJ93-BDU4>] (stating that there is “free rein” in the world of youth sport because of lack of regulation).

38. Koller, *supra* note 27, at 688–89; see B. DAVID RIDPATH, *ALTERNATIVE MODELS OF SPORTS DEVELOPMENT IN AMERICA: SOLUTIONS TO A CRISIS IN EDUCATION AND PUBLIC HEALTH* 69 (2018).

39. *Our History*, PRESIDENT’S COUNCIL ON SPORTS, FITNESS & NUTRITION, U.S. DEP’T OF HEALTH & HUMAN SERVICES (Mar. 13, 2018) <https://www.hhs.gov/fitness/about-pcsfn/our-history/index.html> [<https://perma.cc/A2YV-BT7D>].

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Exec. Order No. 13,265, 67 Fed. Reg. 39,841 (June 6, 2002). The order states that the Secretary of HHS shall seek to

(a) expand national interest in and awareness of the benefits of regular physical activity and active sports participation; (b) stimulate and enhance coordination of programs within and among the private and public sectors that promote participation in, and safe and easy access to, physical activity and sports; (c) expand availability of quality information and guidance regarding physical activity and sports participation; . . . (e) target all Americans, with particular emphasis on children and adolescents, as well as populations or communities in which specific risks or disparities in participation in, access to, or knowledge about the benefits of physical activity have been identified.

Council have been to promote awareness of and generate interest in sport participation.⁴⁵ The Council does not seek to use law to create a sport structure that would promote greater participation or otherwise shape sport participation opportunities that are currently being provided.⁴⁶

Instead, youth and amateur sport participation is most often a function of individual means and choice and private sector goals. This fact makes it difficult to even determine how many children engage in competitive sport.⁴⁷ As explained by the Aspen Institute's 2016 State of Play report, "[n]o metric currently exists to measure how many children have consistent access to quality sport activity."⁴⁸ One survey estimated that about twenty-one million children participated in sport.⁴⁹ Shellie Pfohl, director of SafeSport, recently testified before Congress that approximately forty-five million children engage in sport.⁵⁰ Another estimate is that about sixty million participate in youth sport.⁵¹ The data on who is *not* participating in sports may be more troubling than the lack of firm data on who is participating. Studies show that only about 33 percent of children are physically active each day.⁵² The CDC estimates that only about 22 percent of

Id. (1)(a)–(c), (e); *see also* Exec. Order No. 13,545, 2010 WL 2513361, at *1 (June 22, 2010) (President Obama), *revoked by* Exec. Order No. 13,824, 83 Fed. Reg. 8923, 8923 (Feb. 26, 2018) (President Trump).

45. *See Hearing on the Amateur Sports Act*, *supra* note 19, at 90 (statement of Thomas McMillen, Co-Chair, President's Council on Physical Fitness and Sports) (stating that the President's Council is the "sole federal agency devoted to physical fitness and sports"); *Our History*, *supra* note 39.

46. *See* TOM FARREY, *GAME ON: THE ALL-AMERICAN RACE TO MAKE CHAMPIONS OF OUR CHILDREN* 81 (2008) (describing the President's Council on Physical Fitness as a "barely funded, strictly advisory committee that works with the Department of Health and Human Services to recommend programs to encourage sports participation").

47. *See* PROJECT PLAY, ASPEN INST., *STATE OF PLAY 2016: TRENDS AND DEVELOPMENTS* 2 (2016), <https://www.aspeninstitute.org/publications/state-play-2016-trends-developments/> [<https://perma.cc/87FK-HMM9>]; Bruce Kelley & Carl Carchia, "Hey, Data Data—Swing!", *ESPN* (July 11, 2013), http://www.espn.com/espn/story/_/id/9469252/hidden-demographics-youth-sports-espn-magazine [<https://perma.cc/DML5-XFKL>].

48. PROJECT PLAY, *supra* note 47, at 2 (explaining that the lack of firm data is due to the "absence of comprehensive surveillance tools by public health agencies").

49. Kelley & Carchia, *supra* note 47.

50. *Current Issues in American Sports: Protecting the Health and Safety of American Athletes: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 115th Cong. (2017) (statement of Shellie Pfohl, CEO, United States Center for SafeSport) [hereinafter Pfohl Testimony].

51. Kerri McGowan Lowrey, *State Laws Addressing Youth Sports-Related Traumatic Brain Injury and the Future of Concussion Law and Policy*, 10 J. BUS. & TECH. L. 61, 62 (2015).

52. *E.g., Facts & Statistics*, DEP'T HEALTH & HUM. SERVS., <https://www.hhs.gov/fitness/resource-center/facts-and-statistics/index.html> [<https://perma.cc/275N-ATNN>] (last visited Apr. 14, 2018).

six- to nineteen-year-olds get sixty or more minutes of moderate to vigorous physical activity at least five days per week.⁵³ Less than half of children ages six to eleven satisfy the Surgeon General's recommendation of sixty minutes of moderate physical activity per day most days of the week.⁵⁴ Also troubling is the fact that family income makes a significant difference in whether a child or teen participates in sport, with children and teens from the wealthiest households enjoying the benefits of sport participation at a far greater rate than their less affluent peers.⁵⁵ Statistics also show a persistent lag in participation between girls and boys. Forty-five years after Congress enacted Title IX of the Civil Rights Act, participation rates for girls still lag behind that of boys. For instance, about 4.5 million boys participate in high school sport, compared to about 3.3 million girls.⁵⁶ And, despite some decline, childhood obesity remains a significant public health issue, with about 17 percent of children ages two to nineteen being classified as "obese."⁵⁷ About one child in three from this age range is either overweight or obese.⁵⁸

While sport participation, or lack thereof, is a significant public issue, there are also well-documented concerns with youth sport, such as the win-at-all-costs mentality, early specialization, overtraining,⁵⁹ and troubling health issues—such as concussions—that have gotten the attention of policymakers.⁶⁰ This has resulted in a piecemeal approach to regulating youth sport, with policymaking often being more symbolic than transformative. For example, calls for regulation in youth sport surfaced several years ago when media reports of the

53. *Id.*

54. PROJECT PLAY, *supra* note 16, at 6.

55. PROJECT PLAY, *supra* note 47, at 3.

56. NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2014–15 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY (2015), http://www.nfhs.org/ParticipationStatistics/PDF/2014-15_Participation_Survey_Results.pdf [<https://perma.cc/AB9F-ED9M>]; *see also* Education Amendments of 1972, §§ 181–86, Pub. L. No. 92-318, 86 Stat. 235, 304–12 (1972) (codified as amended at scattered sections of 20 U.S.C.).

57. *Childhood Obesity Facts*, CTRS. FOR DISEASE CONTROL, www.cdc.gov/obesity/data/childhood.html [<https://perma.cc/S5H6-DKFU>] (last updated Apr. 10, 2017).

58. *Overweight in Children*, AM. HEART ASS'N, http://www.heart.org/HEARTORG/HealthyLiving/HealthyKids/ChildhoodObesity/Overweight-in-Children_UCM_304054_Article.jsp#.WpCHEpM-dn4 [<https://perma.cc/UGC4-Q8QA>] (last updated July 5, 2016).

59. *See* Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401, 430–32 (2010).

60. *See* Kurt Samson, *Capitol Hill Lawmakers Tackle Football Concussions in School Athletes: Issue Gains Momentum with Media Attention to Injuries*, NEUROLOGY TODAY, Oct. 21, 2010, at 1, 16–17; *see also* Press Release, Pallone Calls for Meaningful Action to Address Risks Posed by Concussions & Repetitive Brain Trauma (Mar. 14, 2016), <https://pallone.house.gov/press-release/pallone-calls-meaningful-action-address-risks-posed-concussions-repetitive-brain> [<https://perma.cc/3ENJ-URSN>].

dangers of sport concussions drew considerable attention.⁶¹ Currently, all fifty states and the District of Columbia have statutes addressing concussions in youth sport,⁶² and over the last several years a handful of bills have been introduced in Congress to set uniform federal concussion management standards, support concussion research, and emphasize the role of schools in helping children with concussions “return to learn.”⁶³ The limited nature of such laws, however, makes them of questionable effectiveness.⁶⁴

Other measures have been aimed at specific health issues in youth sport, with some states legislating standards for pre-participation physicals, specifically to require screening for cardiac conditions.⁶⁵ Other states have focused on immunity statutes for those who work in the amateur sport setting.⁶⁶ For instance, some states provide malpractice immunity for physicians acting as volunteers in connection with school or other amateur sports organized for children.⁶⁷ Other types of statutory immunity include provisions for physicians who supervise or direct athletic trainers.⁶⁸

Although amateur sport is characterized by relatively little government regulation, it is not without governance. Nearly all levels of amateur sport have their own private regulatory bodies. In addition to the USOC, the National Collegiate Athletic Association (NCAA),⁶⁹ National Federation of State High School Associations,⁷⁰

61. See Sheila Mickool, *The Story Behind the Zackery Lystedt Law*, SEATTLE MAG. (Apr. 9, 2013), <http://www.seattlemag.com/article/story-behind-zackery-lystedt-law> [https://perma.cc/T3MN-9DTM].

62. Lowrey, *supra* note 51, at 63.

63. See, e.g., Youth Sports Concussion Act, H.R. 4460, 114th Cong. (2016); Youth Sports Concussion Act, S. 2508, 114th Cong. (2016); Protecting Student Athletes From Concussions Act of 2015, H.R. 2062, 114th Cong. (2015); SAFE PLAY Act, H.R. 829, 114th Cong. (2015); *Return to Learn*, BRAIN INJURY ASS'N AM., <https://www.biausa.org/brain-injury/about-brain-injury/concussion/return-to-learn> [https://perma.cc/B5X3-AJ5H] (last visited Mar. 25, 2018).

64. See Lowrey, *supra* note 51, at 64–66.

65. See, e.g., N.J. STAT. ANN. § 26:2-192(a) (West 2015); N.J. STAT. ANN. § 18A:40-41.7 (West 2013).

66. See, e.g., ARIZ. REV. STAT. ANN. § 32-4103 (2010); LA. STAT. ANN. § 9:2798 (1999); MINN. STAT. ANN. § 604A.11 (West 1994); OHIO REV. CODE ANN. § 2305.231(B) (West 2015).

67. See, e.g., LA. STAT. ANN. § 9:2798; MINN. STAT. ANN. § 604A.11; OHIO REV. CODE ANN. § 2305.231(B).

68. See, e.g., ARIZ. REV. STAT. ANN. § 32-4103(E).

69. See, e.g., ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, NCAA, 2017–18 NCAA DIVISION I MANUAL (2017), <http://www.ncaapublications.com/productdownloads/D118.pdf> [https://perma.cc/K8QU-NGXH]; ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, NCAA, 2017–18 NCAA DIVISION II MANUAL (2017), <http://www.ncaapublications.com/productdownloads/D218.pdf> [https://perma.cc/5P83-U3HX]; ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, NCAA, 2017–2018 NCAA DIVISION III MANUAL (2017), <http://www.ncaapublications.com/productdownloads/D318.pdf> [https://perma.cc/D5MS-XPQ7].

and state high school athletic associations⁷¹ all have detailed rules for the way sport within their jurisdictions is governed. In the meantime, athletes, coaches, and administrators may move freely among the various sport contexts. For example, an Olympic athlete may also be an intercollegiate athlete, subject to both USOC and NCAA regulation. Frequently, a private sector “club” or travel team youth athlete will often compete for his or her school team as well.⁷²

The free flow of athletes and others among athletic contexts has numerous benefits for both athletes and athletic regulators. For instance, many Olympic athletes are drawn from intercollegiate sports, and colleges and universities maintain facilities that are sometimes used in Olympic training.⁷³ In addition, this context-specific way of operating has the benefit of ensuring that the needs of each level of sport are closely addressed through consultation with relevant stakeholders and not through one-size-fits-all policy. However, relatively unconnected athletic contexts, even where athletes may move freely between them, can raise troubling issues of lack of information sharing between regulators. For example, USA Gymnastics’ team physician, Dr. Nassar, also served as a provider for Michigan State University’s gymnasts. While Michigan State reportedly received complaints about Nassar, these were allegedly not shared (at least in a timely way) with USA Gymnastics.⁷⁴ Similarly, while athletes can easily move between different sport environments,

70. See NAT’L FED’N OF STATE HIGH SCH. ASS’NS, NFHS HANDBOOK 2017–18 (2017), http://www.nfhs.org/media/1018784/2017-18_nfhs_handbook.pdf [https://perma.cc/3HKT-T4PH]; *Rule Books and Case Books Available as E-books*, NAT’L FED’N STATE HIGH SCH. ASS’NS (Feb. 12, 2018), <http://www.nfhs.org/articles/rules-books-and-case-books-available-as-e-books/> [https://perma.cc/UJ62-MSLU].

71. See, e.g., MD. PUB. SECONDARY SCHS. ATHLETIC ASS’N, HANDBOOK OF THE MARYLAND PUBLIC SECONDARY SCHOOLS ATHLETIC ASSOCIATION 4, https://www.mpssaa.org/assets/1/6/Handbook_1718_web.pdf [https://perma.cc/U9UG-7W92] (last visited Feb. 14, 2018); MO. STATE HIGH SCH. ACTIVITIES ASS’N, 2017–18 MSHSAA OFFICIAL HANDBOOK 2 (2017), <http://www.mhsaa.org/resources/pdf/Official%20Handbook.pdf> [https://perma.cc/T7GM-EJAJ]; *Rule & Case Books, 2017–18*, IHSA, <https://www.ihsastore.com/collections/rule-case-books-2017-18> [https://perma.cc/5ADZ-Y5A5] (last visited Feb. 14, 2018).

72. See, e.g., Dionne L. Koller, *How the Expressive Power of Title IX Dilutes Its Promise*, 3 HARV. J. SPORTS & ENT. L. 103, 136 (2012).

73. See *Student-Athletes at the 2018 Winter Olympics*, NCAA (Feb. 6, 2018, 8:48 AM), <http://www.ncaa.org/about/resources/media-center/student-athletes-2018-winter-olympics> [https://perma.cc/PW5L-Z23J]; see, e.g., *U.S. Olympic Training Site*, AUBURN U., <http://www.education.auburn.edu/initiatives/u-s-olympic-training-site/> [https://perma.cc/4Q37-HRDT] (last visited Feb. 18, 2018).

74. Will Hobson, *Doctor at Center of USA Gymnastics Scandal Left Warning Signs at Michigan State*, WASH. POST (Apr. 25, 2017), https://www.washingtonpost.com/sports/olympics/doctor-at-center-of-usa-gymnastics-scandal-left-warning-signs-at-michigan-state/2017/04/25/eed48834-2530-11e7-a1b3-faff0034e2de_story.html?utm_term=.1f6102cfebf8 [https://perma.cc/5PCY-68G7].

the patchwork of amateur sport settings also creates significant “voids”⁷⁵ that leave numerous children on the sidelines. Such issues illustrate that Congress’s “hands off” approach to sport, with inconsistent, context-specific legislation (mostly at the state level), is ripe to be rethought. As explained below, such a view fails to recognize a purpose for amateur sport beyond anchoring the Olympic and professional pipeline. Instead, what is needed now is a balanced approach to sport policymaking that reflects a comprehensive, nuanced understanding of the challenges presented by the enormous growth at all levels of US sport and the needs of millions of children who could benefit from participation. That conversation should begin with a rethinking of the Amateur Sports Act.

B. The Organization of Olympic Movement Sport

Understanding the Amateur Sports Act also requires an understanding of the larger international sport context within which the US Olympic program operates. This is because the provisions of the Amateur Sports Act reflect not only US values with respect to sport, but also the structure of international sport, through what is known as the “Olympic Movement.” Indeed, before Congress enacted the Amateur Sports Act, the International Olympic Committee (IOC) and some international sport federations (IFs) called for reform of US Olympic Movement sport.⁷⁶ Those reforms, however, were limited by Olympic Movement rules.⁷⁷

The Olympic Movement is defined as “the concerted, organised, universal and permanent action,” across the world, of “all individuals and entities who are inspired by the values of Olympism.”⁷⁸ To that end, the Olympic Movement is governed by the IOC, which serves as the “supreme authority,”⁷⁹ as well as IFs, NGBs and National Olympic

75. PRESIDENT’S COMM’N ON OLYMPIC SPORTS, *supra* note 18, at 13 (“[T]he overall system for amateur athletics in this country is characterized by the voids as much as by the positive programs . . .” (emphasis omitted)).

76. See *id.* at xviii (stating that the General Assembly of International Federations, the IOC, and various IFs have “suggested that the U.S. organize its amateur sports system into a vertical structure and designate one organization to be in charge”); see also *id.* at 73 (“An IOC officer would like to see independent sports associations in the U.S.”).

77. See *id.* at xx (“An organization to serve as the highest authority in the U.S. would have to meet certain international requirements if the U.S. is to maintain acceptance and recognition by the IOC and the international federations.”).

78. INT’L OLYMPIC COMM., OLYMPIC CHARTER 11 (2017), https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=2.221908824.1365924338.1518580393-1593853862.1518580393 [<https://perma.cc/UR3V-RP5X>].

79. *Id.* at 15.

Committees (NOCs), and the local organizing committee for a particular four-year Olympiad.⁸⁰ The Olympic Charter governs the “organisation, action and operation” of Olympic Movement sport as well as the Olympic Games.⁸¹ The Olympic Charter contains the “principles, rules, and by-laws adopted by the International Olympic Committee (‘IOC’) that govern the Olympic Movement.”⁸²

All sport governing bodies, athletes, and others acting within the Olympic Movement must be recognized by the IOC and comply with the Olympic Charter.⁸³ To participate in Olympic Movement competition, an athlete must be “a national of the country of the NOC which is entering such competitor,”⁸⁴ must be entered in the Olympic Games by his or her NOC, and must agree to abide by the Olympic Charter and his or her sport’s IF and NGB eligibility requirements, including the World Anti-Doping Code.⁸⁵

1. The International Olympic Committee

The mission of the IOC is “to promote Olympism throughout the world and to lead the Olympic Movement.”⁸⁶ To do so, the IOC’s role is to encourage the organization and development of sport and of sport competitions, to “ensure the regular celebration of the Olympic Games,” to work with public and private organizations to “place sport at the service of humanity and thereby to promote peace,” to protect the cohesion and independence of the Olympic Movement, and to “preserve the autonomy of sport” and be a leader in “the fight against doping.”⁸⁷

80. *Id.* (“The three main constituents of the Olympic Movement are the International Olympic Committee (‘IOC’), the International Sports Federations (‘IFs’) and the National Olympic Committees (‘NOCs’). . . . In addition to its three main constituents, the Olympic Movement also encompasses the Organising Committees for the Olympic Games (‘OCOGs’), the national associations, clubs and persons belonging to the IFs and NOCs . . .”).

81. *Id.* at 9; see Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 76 (2008).

82. Mitten & Davis, *supra* note 81, at 76.

83. INT’L OLYMPIC COMM., *supra* note 78, at 12.

84. *Id.* at 78.

85. *Id.* at 77; see Mitten & Davis, *supra* note 81, at 77. The World Anti-Doping Code is described as the “core document that harmonizes anti-doping policies, rules and regulations within sport organizations and among public authorities around the world.” *The Code*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/the-code> [https://perma.cc/RW37-QVN8] (last visited Mar. 25, 2018). The Code provides a unified approach to research, testing, and sanctions. *Id.*

86. INT’L OLYMPIC COMM., *supra* note 78, at 16.

87. *Id.*

The IOC owns the rights to the Olympic Games and is the ultimate authority on all issues relating to the Olympic Games and the Olympic Movement.⁸⁸ The IOC's responsibilities include creating and applying rules and regulations concerning the Olympic Games as well as recognizing and supporting NOCs and IFs, selecting sites for the Games, and negotiating television rights for the Games.⁸⁹ The IOC is composed of individuals and not representatives of nations or other organizations.⁹⁰ The IOC is a nongovernmental, not-for-profit organization that is based in Lausanne, Switzerland.⁹¹

To "develop and promote" the Olympic Movement, the IOC recognizes IFs that administer sports at the international level and which, in turn, encompass NGBs that administer such sports at the national level.⁹² The IOC issues all invitations to take part in the Olympic Games.⁹³ Only recognized NOCs may submit entries for athletes to compete in the Olympic Games, and all entries are subject to final acceptance by the IOC.⁹⁴ The Olympic Charter makes clear that "[n]obody is entitled as of right to participate in the Olympic Games."⁹⁵

To participate in the Olympic Games, athletes must agree to submit disputes to the Court of Arbitration for Sport (CAS).⁹⁶ Moreover, athletes who participate in international competitions must agree through the governing IF to submit any issues to the CAS.⁹⁷ Commentators have noted that the CAS "provides a unique example of a private international legal regime that has almost entirely displaced domestic adjudication" of Olympic Movement sport disputes.⁹⁸ Like the IOC, the CAS's seat is in Lausanne, Switzerland, and it is governed by Swiss law.⁹⁹

88. *Id.* at 21–22.

89. *Id.* at 21–22, 52, 70.

90. *Id.* at 32.

91. *Id.* at 31.

92. *Id.* at 55.

93. *Id.* at 79.

94. *Id.* at 80.

95. *Id.*

96. *Id.* at 81; Maureen A. Weston, *Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport*, 38 GA. J. INT'L & COMP. L. 97, 107–08 (2009).

97. Weston, *supra* note 96, at 107–08.

98. Annie Bersagel, *Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field*, 12 PEPP. DISP. RESOL. L.J. 189, 189 (2012).

99. *Frequently Asked Questions*, TRIBUNAL ARBITRAL DU SPORT/COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html> [<https://perma.cc/8SXT-KE2V>] (last visited Mar. 26, 2018).

2. International Federations for Sport

IFs are nongovernmental organizations recognized by the IOC that serve as the governing body for a particular sport at the international level.¹⁰⁰ For instance, the Fédération Internationale de Gymnastique governs gymnastics,¹⁰¹ and the Fédération Internationale de Football Association¹⁰² governs soccer. Subject to the limitations of the Olympic Charter and World Anti-Doping Code, each IF has the authority to administer its sport,¹⁰³ including establishing eligibility criteria for participation in the Olympic Games.¹⁰⁴ In addition, NGBs for a particular sport exercise regulatory authority over that sport in the NGB's country.¹⁰⁵ IFs have broad control over the conduct of sport competition under their auspices. Each IF establishes and enforces eligibility criteria and organizational and technical rules which govern their sport,¹⁰⁶ including all technical control and direction of all aspects of the sport's competition at the Olympic Games.¹⁰⁷ There are thirty-five IFs.¹⁰⁸

3. National Olympic Committees

As outlined in the Olympic Charter, the purpose of NOCs is to “develop, promote and protect the Olympic Movement in their respective countries.”¹⁰⁹ As such, NOCs are granted by the Olympic Charter the “exclusive authority” to represent their countries at the Olympic Games and at other Olympic Movement competitions¹¹⁰ and the authority to select the city within their country that may bid to host the Olympic Games.¹¹¹ Although NOCs are permitted to

100. Mitten & Davis, *supra* note 81, at 76 (giving the example of the International Amateur Athletic Federation as the governing body for track and field).

101. *The FIG in Brief*, FIG-GYMNASTICS, <http://www.fig-gymnastics.com/site/about/federation/brief> [https://perma.cc/S7MN-MTH7] (last visited Mar. 26, 2018).

102. *How FIFA Works*, FIFA, <http://www.fifa.com/governance/how-fifa-works/index.html> [https://perma.cc/G8TM-C9EW] (last visited Mar. 26, 2018).

103. INT'L OLYMPIC COMM., *supra* note 78, at 55.

104. *Id.* at 77.

105. Mitten & Davis, *supra* note 81, at 76 (giving the example of USA Track & Field as a member of the International Amateur Athletic Federation and the NGB for track and field in the United States).

106. INT'L OLYMPIC COMM., *supra* note 78, at 86–88.

107. *Id.*

108. U.S. OLYMPIC COMM., ANNUAL REPORT 2015, at 6 (2015), http://2015annualreport.teamusa.org/USOC_AR15.pdf [https://perma.cc/4J8U-CH62].

109. INT'L OLYMPIC COMM., *supra* note 78, at 59.

110. *Id.* at 60.

111. *Id.*

“cooperate” and “achieve harmonious relations” with governmental bodies in their respective countries, NOCs are required by the Olympic Charter to remain autonomous and resist political or other pressure that would prevent them from complying with the Olympic Charter.¹¹² In addition, among other things, NOCs are charged with encouraging within their respective countries “the development of high performance sport as well as sport for all.”¹¹³ NOCs, like IFs, also must adopt and enforce the World Anti-Doping Code.¹¹⁴ There are 206 national Olympic committees worldwide.¹¹⁵

The NOC for the United States is the USOC. The USOC is recognized by the IOC as the national Olympic committee authorized to represent the United States in all matters concerning US participation in the Olympic Movement.¹¹⁶ The USOC does not receive federal funding, and it states that it is “one of the only NOCs in the world that also manages Paralympic activities.”¹¹⁷ The USOC recognizes thirty-one Olympic summer sport NGBs and eight winter sport NGBs, as well as six Paralympic sport governing bodies.¹¹⁸

C. The Amateur Sports Act: Purpose and Provisions

The Amateur Sports Act operates to position the USOC in the larger Olympic Movement and to create a distinctly American—and highly successful—Olympic program. The current version of the statute is generally the same as it was when originally enacted in 1978. Moreover, though Congress has held numerous hearings and focused on various issues, such as USOC governance,¹¹⁹ the structure of the US Olympic Movement has not changed. However, the operational reality of the USOC has consistently been narrowed to what it is today: producing winning Olympic teams.¹²⁰ Congress has tacitly accepted that the USOC cannot both achieve Olympic success

112. *Id.*

113. *Id.* at 59.

114. *Id.* at 60.

115. U.S. OLYMPIC COMM., *supra* note 108, at 6.

116. Mitten & Davis, *supra* note 81, at 91.

117. U.S. OLYMPIC COMM., *supra* note 108, at 4.

118. *Id.* at 7.

119. See, e.g., *State of the United States Olympic Committee (USOC): Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 108th Cong. 2 (2003) [hereinafter *Hearing on the State of the USOC*] (statement of Sen. Ted Stevens, S. Comm. on Commerce, Sci. & Transp.).

120. Hobson & Rich, *supra* note 2 (explaining that while the Amateur Sports Act “gave the USOC wide-ranging responsibilities,” the USOC “historically has taken a focused view of its mission”); see also *id.* (quoting Donna Lopiano as saying that “[t]he USOC doesn’t see itself as very broad in scope Rather than think broadly and act like a ministry of sport, the USOC has decided to narrow its scope, strategically, to elite athletes and winning gold medals.”).

and effectively develop grassroots participation opportunities to promote other social goals. Thus, the need for a comprehensive amateur sport policy and grassroots sport development has fallen by the wayside in favor of elite, high-performance sport.

The original catalyst for the Amateur Sports Act was the “overall decline of American achievement” in Olympic Movement competition.¹²¹ The original version of the statute derived from the work of the President’s Commission on Olympic Sports, established by President Ford in 1975.¹²² The Commission recommended reforms to address the structural issues inherent in US amateur sport that contributed to relatively disappointing results in international competition.¹²³ Prior to 1978, amateur sport in the United States truly was the product of the free market.¹²⁴ At the time, there was no entity with exclusive jurisdiction over Olympic Movement sport in the United States, so that organizations such as the NCAA and the Amateur Athletic Union struggled for control over various sports, and athletes competing for a rival organization were threatened with being declared ineligible.¹²⁵ The disputes and disorganization resulted in a marked decline in US athletic achievement in international sport.¹²⁶ The statute therefore sought to address the structure of amateur athletics that often prevented talented athletes from competing in international competition.¹²⁷ The Commission noted at the outset that

121. *Amateur Sports Act of 1978*, S. REP. NO. 95-770, at 8–9 (1978) (“The overall decline of American achievement in Olympic and international competition was apparent. For a nation of almost 250 million people we were falling seriously below our potential to both field strong international teams and to guarantee greater athletic opportunities at the grassroots level.”); see H.R. REP. NO. 95-1627 as reprinted in 1978 U.S.C.A.N. 7478, 7482.

122. Exec. Order No. 11,868, 40 Fed. Reg. 26,255 (June 19, 1975).

123. See PRESIDENT’S COMM’N ON OLYMPIC SPORTS, *supra* note 18, at 2 (“[T]he United States is in severe trouble in the conduct and performance of its amateur sports program. . . . [T]he current organizational system for amateur sports simply is not good enough to continue representing the United States as a major power in international amateur athletic competition.”).

124. *Id.* at 3–5 (“[T]he free enterprise system has allowed a multitude of amateur sports organizations to flourish in this country. . . .”).

125. PRESIDENT’S COMM’N ON OLYMPIC SPORTS, THE FINAL REPORT OF THE PRESIDENT’S COMMISSION ON OLYMPIC SPORTS 1975–1977, at 2–3 (1977) (explaining that jurisdictional disputes between amateur sports regulators acted to “stymie” athletes’ careers). The Commission cited the example of high school and college students who “have lost their eligibility to compete in school sports because they have represented the nation in international competition Athletes have been prevented by the NGB from competing in their sport simply because it was sponsored by a rival organization.” *Id.*

126. See *id.* at 1.

127. See *Amateur Sports Act of 1978*, S. REP. NO. 95-770, at 2–3 (“Because no real structure exists which serves to define the jurisdictional limits of various organizations, disputes have arisen. In their struggles for power and for control over a sport, organizations have frequently told their athletes that if they choose to compete in a rival organization’s program,

"[i]n international sport[,] . . . American performances are deteriorating. Against athletes from nations for whom Olympic medals are as precious as moon rocks, U.S. competitors seem to have steadily diminishing chances of success."¹²⁸

The President's Commission was charged with determining what factors prevented the United States from achieving greater international sporting success,¹²⁹ and its report strongly reflected the Cold War mentality at the time. The report declared that "a nation's success in international sports competition is not indicative of the merits of its ideology—despite some countries' attempts to convince us otherwise."¹³⁰ Nevertheless, the Commission still asserted that "America's strengths are clearly reflected in her sport."¹³¹ According to the Commission, however, the converse was not true, as its report stated that "the weaknesses of American sport are not indications of concomitant weaknesses in the nation."¹³² The Commission ultimately set about to recommend a uniquely American style for Olympic Movement sport. The Commission explained "the United States must rely on its greatest strength, free enterprise, to help finance amateur sport."¹³³

Despite its ultimate emphasis on an American style for amateur sport regulation, the Commission highlighted important deficiencies in the way amateur sport was structured. The Commission noted that there was "no truly effective system for amateur athletics in this country"¹³⁴ and that the overall structure of amateur sport was "characterized by its voids as much as by its positive programs."¹³⁵ The Commission also underscored throughout its report the importance of broad-based, grassroots sport opportunities, stating "few would challenge the goal of encouraging mass participation in sports."¹³⁶ The Commission stated that participation in amateur sport should be expanded not just for greater

they will be declared ineligible for future competition."); PRESIDENT'S COMM'N ON OLYMPIC SPORTS, *supra* note 18, at 3.

128. PRESIDENT'S COMM'N ON OLYMPIC SPORTS, *supra* note 125, at 1.

129. *Id.* at ix.

130. *Id.* at 1.

131. *Id.* at 11.

132. *Id.*

133. *Id.* at 79.

134. PRESIDENT'S COMM'N ON OLYMPIC SPORTS, *supra* note 18, at xii ("Rather, there are numerous organizations that function independently in amateur sports.").

135. *Id.* at xiii.

136. *Id.* at 41.

Olympic success but also “for its own sake,”¹³⁷ as in the Commission’s view, amateur sport is in the public interest.¹³⁸

The Commission’s primary recommendation was to create a centralized sport organization that had the exclusive right to select athletes for Olympic Movement competition.¹³⁹ The Commission recommended that Congress enact legislation to, among other things, establish the modern version of the USOC¹⁴⁰ through adopting what is now known as the Amateur Sports Act. Despite the USOC’s name, which suggests it is a government agency or has government affiliation, the Commission “made it clear that it did not want the Federal Government running amateur athletics in this country.”¹⁴¹ Congress therefore created the USOC as a federally chartered, nonprofit patriotic corporation, and not a federal instrumentality. The Amateur Sports Act created what was called a “vertical” structure¹⁴² for amateur sport that gave the USOC the exclusive power to coordinate and govern Olympic Movement athletics in the United States. The USOC was given no authority to regulate interscholastic or intercollegiate athletic competition.¹⁴³

The legislative history of the Amateur Sports Act mentions a variety of issues that Congress hoped would be addressed through this new structure. First, the Act was intended to provide a mechanism for resolving disputes and establishing greater coordination that would “bring order” to the splintered amateur sport community.¹⁴⁴ The Amateur Sports Act would do this by empowering the USOC, consistent with the Olympic Charter, to recognize an NGB for each Olympic Movement sport.¹⁴⁵ The Amateur Sports Act also required dispute resolution procedures so that athletes and other affected parties would not be harmed by jurisdictional or other conflicts.¹⁴⁶ Second, the legislative history emphasized the need to develop programs for women and disabled athletes.¹⁴⁷ Third, consistent with the views of the President’s Commission, the legislative history

137. *Id.* at xii.

138. *Id.* at 38 (“[A]mateur sports are in the public domain and exist for the enjoyment of everyone. . .”).

139. *See id.* at xix.

140. The USOC was originally established in 1896. *Amateur Sports Act of 1978*, S. REP. NO. 95-770, at 2 (1978).

141. *Id.* at 3.

142. *Id.*

143. *See* 36 U.S.C. § 220526(a) (2012).

144. S. REP. NO. 95-770, at 4.

145. 36 U.S.C. § 220521(a).

146. *Id.* § 220509(a).

147. S. REP. NO. 95-770, at 5.

evinced a vision for the USOC as the entity that would broadly expand grassroots sport opportunities. For instance, in a letter to the Senate Commerce Committee, the USOC made the case for funding to support its work, stating that

broad-scale amateur sports opportunities for a maximum number of individuals at all ages and all levels of ability not only serve as a deterrent to many of our current social problems, but also make a substantial contribution to the development of the individual and to our society. If the United States is to benefit from these opportunities, it is imperative that adequate funding be provided for the full spectrum of amateur sports programs designed for the beginner as well as the elite athlete.¹⁴⁸

In short, the original vision for the USOC was that it would serve to ‘develop grassroots sport opportunities, with particular attention to creating opportunities for women and disabled athletes, and that it would ensure the best possible representation on the US Olympic teams.

In the resulting legislation, Congress listed fourteen different purposes for the USOC, five of which are directly tied to its relationship to the greater Olympic Movement, with the remainder—while relevant to the Olympic pipeline—directed more generally to US amateur sport.¹⁴⁹ Thus, the statute directs the USOC to “coordinate and develop amateur athletic activity” as it relates to international competition;¹⁵⁰ “exercise exclusive jurisdiction . . . over all matters” relating to US participation in and organization of the Olympic and Paralympic Games;¹⁵¹ “obtain for the United States” the best athletic representation possible for the Olympic and Paralympic Games;¹⁵² “promote and support” athletic activities involving the United States and other nations;¹⁵³ provide “swift resolution” for conflicts involving athletes and NGBs; and “protect the opportunity” of athletes and others to participate in athletic competition.¹⁵⁴

More generally, however, the USOC is also charged with establishing “national goals for amateur athletic activities” and encouraging the achievement of such goals;¹⁵⁵ “promot[ing] and encourag[ing] physical fitness” and the public’s participation in

148. *Id.* at 12–13.

149. See 36 U.S.C. § 220503(1)–(14). Congress added subsection (15) in February 2018. See Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, § 201, 132 Stat. 318 (2018) (codified as amended at 36 U.S.C. § 220503(15)).

150. 36 U.S.C. § 220503(2).

151. *Id.* § 220503(3).

152. *Id.* § 220503(4).

153. *Id.* § 220503(5).

154. *Id.* § 220503(8).

155. *Id.* § 220503(1).

athletics;¹⁵⁶ assisting in developing amateur athletic programs;¹⁵⁷ providing “technical information” relevant to training, coaching, and performance, as well as supporting sports medicine and sport safety research;¹⁵⁸ and, finally, “encourag[ing] and provid[ing] assistance to amateur athletic activities” for women, athletes with disabilities, and athletes “of racial and ethnic minorities.”¹⁵⁹ To support all its activities, Congress granted the USOC the exclusive right to control the Olympic trademarks.¹⁶⁰ The Senate Committee on Commerce, Science, and Transportation has taken a lead role in overseeing issues related to the US Olympic Movement and the USOC.¹⁶¹

To meet its charge, the Amateur Sports Act provided that the USOC had the power to recognize privately incorporated NGBs, such as USA Gymnastics, for each Olympic Movement sport.¹⁶² The NGBs are thus responsible for developing the athletes that ultimately form Team USA. The Amateur Sports Act outlines the criteria for an amateur sport organization to be recognized as an NGB.¹⁶³ The NGBs, in turn, establish specific eligibility criteria for athletes in their respective sport.¹⁶⁴ In addition, NGBs have the authority to represent the United States in the applicable IF¹⁶⁵ and to serve as the coordinating body for its sport throughout the United States, which includes setting national goals and sanctioning international competitions that occur within the United States,¹⁶⁶ conducting national championships,¹⁶⁷ and recommending to the USOC athletes and teams suitable to represent the United States in the Olympic Games, the Paralympic Games, the Pan-American Games, and other

156. *Id.* § 220503(6).

157. *Id.* § 220503(7).

158. *Id.* § 220503(10)–(11).

159. *Id.* § 220503(12)–(14).

160. *See* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 530, 539 (1987); *see also* U.S. Olympic and Paralympic Brand Usage Guidelines, TEAM USA, <https://www.teamusa.org/brand-usage-guidelines> [<https://perma.cc/5BZ6-5TK3>] (last visited Mar. 29, 2018).

161. *Hearing on the State of the USOC*, at 1 (statement of Sen. John McCain, Chairman, S. Comm. on Commerce, Sci. & Transp.).

162. 36 U.S.C. § 220505(c)(4).

163. *Id.* § 220522. The Act explains that an amateur sport organization is eligible to be recognized as an NGB only if, among other things, it is incorporated as a nonprofit corporation with the purpose of advancing amateur athletic competition and it “has the managerial and financial capability to plan and execute its obligations.” *Id.* § 220522(a).

164. *Id.* § 220523(a)(5).

165. *Id.* § 220523(a)(1).

166. *Id.* § 220523(a)(2)–(4).

167. *Id.* § 220523(a)(5).

international competitions.¹⁶⁸ The responsibility of NGBs over their respective sports is reportedly why the USOC responded that it did not have primary responsibility to address the allegations of sexual abuse that came under the watch of USA Gymnastics.¹⁶⁹

NGBs have additional duties related to grassroots sport. For instance, NGBs are required to “develop interest and participation” in their respective sport and must “be responsible to the persons and amateur sports organizations [they] represent[.]”¹⁷⁰ NGBs must also “keep amateur athletes informed of policy matters” and incorporate the views of athletes in policy decisions.¹⁷¹ Like the USOC, NGBs have an obligation to encourage athletic participation by women and individuals with disabilities.¹⁷²

The Amateur Sports Act was amended in 1998,¹⁷³ but the core provisions were not changed. The purpose of the amendment was to “update” the Amateur Sports Act to reflect changes in the Olympic Movement since Congress enacted the original version, including the alternate schedule for the summer and winter Olympics (with a Games occurring every two years), which significantly changed the USOC’s “workload,” and a change in IF policy allowing professional athletes to compete in some Olympic sports, such as basketball.¹⁷⁴ Congress also noted that the Paralympic Movement had grown “in size and prestige,”¹⁷⁵ and the statute included language to provide for “complete recognition” of the US Paralympic Movement.¹⁷⁶ The effect was that the USOC was tasked with the “same duties with respect to the Paralympic Games as it has with the Olympic Games,” in that the USOC would be responsible for selecting athletes for teams,

168. *Id.* § 220523(a)(6)–(7).

169. Hobson, *supra* note 8; Hobson & Rich, *supra* note 2 (explaining that the Amateur Sports Act, and how it has been interpreted, “has played a central role in the USOC’s historic inaction on child protection”).

170. 36 U.S.C. § 220524(1).

171. *Id.* § 220524(3).

172. Although the USOC has an obligation to encourage athletic participation by women, minorities, and individuals with disabilities, Congress only requires NGBs to encourage participation by women and individuals with disabilities. *See id.* § 220524(6)–(7).

173. *See* Ted Stevens Olympic and Amateur Sports Act, Pub. L. No. 105-225, §§ 220501–29, 112 Stat. 1253, 1465–78 (1998) (codified as amended at 36 U.S.C. §§ 220501–29 (2012)).

174. *Olympic and Amateur Sports Act Amendments of 1998*, S. REP. NO. 105-325, at 2 (1998); *see* Jan Hubbard, *Why Can Pros Compete in International Events*, USA BASKETBALL, <https://www.usab.com/history/why-can-pros-complete-in-international-events.aspx> [<https://perma.cc/T3MV-75LT>] (last visited Mar. 26, 2018). Congress changed the title of the law to the “Olympic and Amateur Sports Act” to reflect this. *See* S. REP. NO. 105-325, at 1.

175. S. REP. NO. 105-325, at 2.

176. *Id.* at 5.

representing the United States in the international Paralympic Movement, providing financial support for Paralympic teams, and providing the same dispute resolution rights to disabled athletes.¹⁷⁷ Congress also changed the terminology of the statute to make clear that “disabled athletes are ‘amateur athletes’” under the statute.¹⁷⁸

The amendments also provided additional protections for athletes. Congress required the USOC to maintain an Athletes’ Advisory Council and required that amateur athletes comprise at least 20 percent of the USOC board and other committees.¹⁷⁹ The USOC was required to hire an athlete “ombudsman” to advise athletes on their rights.¹⁸⁰ The USOC was also given additional authority, including the ability to remove to federal court any suit brought in state court for violation of the Amateur Sports Act, and a provision was introduced preventing a court from entering injunctive relief against the USOC in any dispute over an athlete’s participation in the Olympic Games where the claim is brought within twenty-one days of the event.¹⁸¹ The purpose of these revisions was to allow the USOC to maintain its authority to determine who will represent the United States when a dispute over such issues arises too close to the commencement of the Games, and where the USOC’s own dispute resolution procedures cannot provide for a decision in time.¹⁸² The USOC was also given the authority to send an “incomplete team” if there are not enough qualified athletes.¹⁸³ These amendments all provided important improvements to the quality of the Olympic program, particularly for athletes and the Paralympic Movement. None of the changes were aimed at expanding the USOC’s obligations with respect to developing grassroots sport opportunities.

Congress did, however, hold hearings about the issue. For instance, in 1995, Congress held hearings on a variety of issues related to the Amateur Sports Act, specifically considering whether the USOC was meeting the “grass-roots’ mandate.”¹⁸⁴ At least one

177. *Id.*

178. *Id.*

179. *Id.* at 5–6.

180. *Id.* at 7.

181. 36 U.S.C. § 220505(b)(9) (2012) (“[A]ny civil action brought in a State court against the corporation . . . shall be removed, at the request of the corporation, to the district court of the United States in the district in which the action was brought”); *id.* § 220509(a) (“[A] court shall not grant injunctive relief against the corporation within 21 days before the beginning of such games”); S. REP. NO. 105-325, at 4–6.

182. S. REP. NO. 105-325, at 6–7.

183. *Id.* at 7.

184. *Hearing on the Amateur Sports Act*, *supra* note 19, at 2 (statement of Sen. Ted Stevens, S. Comm. on Commerce, Sci. & Transp.) (stating that one hearing panel would address

senator noted that the Amateur Sports Act articulated "ambitious goals" for the USOC with respect to developing amateur athletes.¹⁸⁵ Senator John McCain, while questioning the USOC about whether it was doing enough to develop grassroots sport, pointed out that "Olympic leaders admit that the committee programs and emphasis are geared toward elite athletes and the pursuit of Olympic medals."¹⁸⁶ Similarly, the President of the Amateur Athletic Union testified that "NGB's [*sic*] have focused only on the elite athletes" and not the "base of the pyramid."¹⁸⁷ Tom McMillen, Co-Chair of the President's Council on Physical Fitness and Sports, testified that there was generous financial support for elite athletes in the United States, but very little for youth recreational athletics.¹⁸⁸ McMillen recommended allocating more resources to grassroots sport and increased government attention to recreational sport.¹⁸⁹ He also recommended that Congress "strengthen the grassroots provisions of the Amateur Sports Act so that it has teeth," including specific benchmarks for programming and resource allocation.¹⁹⁰

The USOC responded by stating that, while it recognized the importance of grassroots sport, "we cannot be all things to all people with limits on our financial resources" and that "[n]o other of the almost 200 national Olympic committees in the world face the challenges we face" in having to both develop grassroots sport opportunities and elite athletes who will be successful in Olympic competition.¹⁹¹ In explaining the financial challenge of such a mandate, the USOC stated that "our focus has become so wide that we

the requirement that the USOC and NGBs promote grassroots sport and that Congress was interested in "whether these grass-roots requirements are being met, or ways to more effectively ensure that they are met"); *id.* at 33 (statement of LeRoy T. Walker, President, United States Olympic Committee).

185. *Id.* at 5 (statement of Sen. Larry Pressler, Chairman, S. Comm. on Commerce, Sci. & Transp.).

186. *Id.* at 85 (stating that the effect is that "it is extremely tough for young people to get involved").

187. *Id.* at 94-95 (statement of Bobby Dodd, President, Amateur Athletic Union).

188. *Id.* at 88 (statement of Tom McMillen, Co-Chair, President's Council on Physical Fitness & Sports) ("[W]hat we have, I believe, is a situation where Government has created one situation, an elite sports structure, and on the other by benign neglect has created an America at the bottom where there are no resources, and I think it is an upside-down system.").

189. *Id.* at 90 ("Our government policies have helped develop and maintain an elite sports structure of significant support for the Olympic Games, professional sports monopolies, tax breaks for mega-stadiums, and anti-trust exemptions for pro teams. In contrast, our government is doing next to nothing for the masses . . .").

190. *Id.* at 92.

191. *Id.* at 33 (statement of LeRoy T. Walker, President, United States Olympic Committee).

can endanger” all of the USOC’s obligations.¹⁹² The USOC explained that the grassroots mandate was a “major issue” that the USOC “has never shirked,” but that without additional resources, it would be difficult to balance developing grassroots amateurs with its “commitment” to high-performance Olympic athletes.¹⁹³ Ultimately, Congress did not provide additional resources, and the issue of grassroots sport development was recast as a shared responsibility with “every organization governing sport in America.”¹⁹⁴

Besides the 1998 and 2018 amendments, the only other substantial policy change for the USOC and the US Olympic Movement was the government’s action to address doping in sport. Although anti-doping efforts have become a central feature of Olympic Movement sport, anti-doping policies are not mentioned in the Amateur Sports Act.¹⁹⁵ Instead, Congress worked with the USOC to create the USADA.¹⁹⁶ The White House Office of National Drug Control Policy simultaneously worked to establish the World Anti-Doping Agency (WADA) and the World Anti-Doping Code.¹⁹⁷ The federal government separately supports the USADA through annual grants.¹⁹⁸ Pursuant to the USOC’s National Anti-Doping Policies,¹⁹⁹ a condition of funding and recognition of an NGB is that the NGB’s rules are fully compliant with the World Anti-Doping Code.²⁰⁰

The recently passed legislation addressing sexual abuse of athletes represents the next stage of US Olympic Movement policymaking—and is an important move toward reforms aimed at athlete well-being. Key features of the legislation include requiring SafeSport to develop procedures and training to prevent all forms of

192. *Id.* at 34.

193. *Id.* at 37–39.

194. *Id.* at 44–46 (statement of Richard Schultz, Executive Director, United States Olympic Committee) (“[W]e cannot retreat on the support and resources we are mandated to offer the elite-level athlete . . .”).

195. See 21 U.S.C. § 2001 (2012) (“Designation of United States Anti-Doping Agency”).

196. See Koller, *supra* note 33, at 114.

197. *Id.* at 113–14.

198. See, e.g., U.S. ANTI-DOPING AGENCY, 2016 ANNUAL REPORT 57 (2017), https://www.usada.org/wp-content/uploads/2016_annual_report.pdf [<https://perma.cc/XL6M-6KUT>] (listing \$9,000,000 in 2015 and \$9,500,000 in 2016 in Office of National Drug Control Policy (ONDCP) annual grants).

199. These policies are the result of the World Anti-Doping Code’s requirement that each NOC adopt specified articles from the Code and incorporate them into the NOC’s own rules. See WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE 2015, at 121 (2015), <https://www.usada.org/wp-content/uploads/wada-2015-world-anti-doping-code.pdf> [<https://perma.cc/LFS7-G858>].

200. U.S. OLYMPIC COMM., NATIONAL ANTI-DOPING POLICY § 4.1 (2015), https://www.usada.org/wp-content/uploads/USOC_anti-doping_policies.pdf [<https://perma.cc/6WGG-PN7J>].

athlete abuse,²⁰¹ and requiring NGBs to implement such procedures. The law also imposes reporting requirements for all adults who interact with amateur athletes at training facilities or competitions to report suspected cases of abuse to law enforcement and the entity designated as being responsible for investigating and resolving such investigations (i.e., SafeSport).²⁰² SafeSport is further required to develop procedures to avoid one-on-one interactions between amateur athletes who are minors and nonguardian adults at sanctioned NGB facilities or events, along with independent oversight procedures.²⁰³ The legislation aims to make clear that the dispute resolution provisions of the Amateur Sports Act should not be an impediment to protecting athletes and addressing allegations of abuse.²⁰⁴

In sum, nearly forty years after it was enacted, the Amateur Sports Act still contains the original vision of the USOC as the entity primarily responsible for both developing grassroots sport and assembling the very best Olympic teams. This mission generally makes sense because the success of the US Olympic program depends on stimulating children's interest in sport. Viewed from this perspective, the USOC's efforts to develop grassroots sport opportunities have been effective. The Olympic pipeline is robust, and the medal counts are high.²⁰⁵

However, developing grassroots sport opportunities is important not simply to generate medals in Olympic Movement competition. Instead, it is important because recreational athletics serve other significant social needs, such as those tied to citizens' health and well-being. From this perspective, the USOC cannot, and should not, be the primary entity in the United States to tackle the issue. Instead, now that it has taken steps to address athlete abuse, Congress should further amend the Amateur Sports Act to adopt provisions that will enhance the well-being of Olympic Movement athletes. Congress should also, however, take the opportunity to

201. See Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, 132 Stat. 318 (2018) (codified at scattered sections of 18, 34, and 36 U.S.C.).

202. *Id.*

203. *Id.*

204. H.R. REP. NO. 115-136, at 5 (2017) ("Although USA Gymnastics received reports of abuse, some victims claimed USA Gymnastics allowed the abuse allegations to remain dormant. . . . USA Gymnastics has claimed that the Ted Stevens Olympic and Amateur Sports Act . . . prevents it from disciplining coaches or other members when allegations are made against them. They claim the Act limits the actions they can take against coaches because it requires due process before a coach's membership can be revoked.").

205. QUAD REPORT, *supra* note 1, at 2.

finish the work started by the President's Commission to create a next generation, true amateur sports act.

III. MODERNIZING THE AMATEUR SPORTS ACT

The next wave of policymaking in the US Olympic Movement should focus on improving the health and well-being of both elite athletes and all US citizens. The recent amendments focusing on athlete abuse are an important step in the right direction, and additional reforms—outlined below—can contribute to even greater protections and benefits for Olympic Movement athletes. However, policymaking should also focus on meaningful ways to address problems with youth, amateur sport, including providing an adequate supply of accessible, grassroots participation opportunities. To do so, Congress should no longer conflate Olympic and amateur sport or view the function of grassroots sport solely as providing an Olympic pipeline. Instead, Congress should relieve the USOC of its statutory role as the entity responsible for developing amateur sport in the United States and move in a new direction that heeds the call from the President's Commission, which stated that “[s]ome countries determine who are their best athletes, then support them to the fullest and pay little attention to the others except for those who have the potential to become ‘elite’ athletes one day. This is not the American way, nor should it be.”²⁰⁶ Specific recommendations for amendments to the Amateur Sports Act are explained below.

A. Update Provisions Related to the Olympic Movement

Updates to the Amateur Sports Act should focus on improving conditions for athletes. When Congress initially enacted the Amateur Sports Act, the statute was meant to address the United States' success (or relative lack thereof) in international sports. As explained above, its underachievement was thought to be the result of structural issues within the amateur athletic community, with the result being that the private sector was failing to work for the common national sporting good.²⁰⁷ The Amateur Sports Act addressed the issue with a new structure for US Olympic Movement sport that would serve the needs of athletes and the nation. The results of the Amateur Sports

206. PRESIDENT'S COMM'N ON OLYMPIC SPORTS, *supra* note 18, at 6.

207. *Id.* at xii–xiii.

Act are undeniable—the United States is consistently at the top of the medal counts in both the summer and winter Olympic Games.²⁰⁸

Now, ensuring that the best athletes have access to international competition is no longer the issue. Instead, it is time to focus on the way athletes are trained and brought along through the Olympic program—in order to look for ways to better balance the drive to win medals with protecting athletes. To do so, Congress should further update the Amateur Sports Act to include provisions that provide greater support to the health and well-being of athletes, beyond the new requirement to have standards for preventing abuse and managing abuse claims. Second, the statute should be amended to provide concrete protections for all types of whistleblowers, so that athletes and other support personnel are encouraged to report wrongdoing and are protected when they do so. Third, Congress should look to strengthen NGBs' commitment to gender equity.

1. Adopt Provisions to Promote Athlete Health and Well-Being

Congress took an important first step toward promoting athletes' health and well-being with the recent passage of requirements to prevent and adequately respond to reports of athlete abuse. Although the full extent of the problem is not known,²⁰⁹ as outlined by a GAO report and underscored during hearings on the legislation, sexual abuse of athletes is a persistent problem within Olympic and amateur sport.²¹⁰ The recent amendment requires SafeSport to develop policies and procedures, applicable to all NGBs, to prevent abuse of minor amateur athletes and properly manage

208. QUAD REPORT, *supra* note 1, at 3 (“Team USA topped the medal chart in every category . . . leading all nations with 121 medals, including 46 golds.”).

209. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 9, at 1.

210. See Haley O. Morton, Note, *License to Abuse: Confronting Coach-Inflicted Sexual Assault in American Olympic Sports*, 23 WM. & MARY J. WOMEN & L. 141, 143 (2016). For instance, speaking of USA Gymnastics, Congress cited a report from the *Indianapolis Star* and stated that “over the past 20 years up to 368 victims . . . were subjected to sexual abuse by coaches, doctors, or other adults affiliated with USA Gymnastics.” H.R. REP. NO. 115-136, at 5 (2017) (citing Tim Evans, Mark Alesia & Marisa Kwiatkowski, *A 20-Year Toll: 368 Gymnasts Allege Sexual Exploitation*, INDYSTAR, <https://www.indystar.com/story/news/2016/12/15/20-year-toll-368-gymnasts-allege-sexual-exploitation/95198724/> [<https://perma.cc/A9G3-HUWM>] (last visited Mar. 27, 2018)). The *Washington Post* reported that “[u]nder the USOC’s watch, six Olympic sport governing bodies have been beset over the years by allegations of mishandled complaints of abuse,” and that “more than 150 coaches and officials associated with Olympic sport governing bodies [have been] convicted of sex crimes since the early 1980s.” Hobson & Rich, *supra* note 2; see also Maureen A. Weston, *Tackling Abuse in Sport Through Dispute System Design*, 13 U. ST. THOMAS L.J. 434 (2017).

allegations of abuse.²¹¹ The legislation also includes a provision limiting liability for the USOC, NGBs, and SafeSport.²¹² The USOC and NGBs will comply with these provisions by relying on the newly formed SafeSport program.²¹³

The USOC formed and funded SafeSport in much the same way that it established the USADA.²¹⁴ Similarly, a SafeSport Code was developed that, like the USADA's protocol for testing and results management, is applicable to all NGBs.²¹⁵ The purpose of the SafeSport program is to "creat[e] and maintain[] a sport community where all persons who participate in sport programs and activities can work and learn together in an atmosphere free of all forms of emotional, physical and sexual misconduct."²¹⁶ The US Olympic and Paralympic Movement first established the SafeSport program in 2012. In 2017, SafeSport was opened in Denver, Colorado.²¹⁷ The program serves all athletes at all competitive levels.²¹⁸ The SafeSport Code is the required protocol for preventing and responding to reports of athlete abuse for the USOC and NGBs.²¹⁹ SafeSport, meanwhile, serves as a resource for other amateur sport organizations.²²⁰

SafeSport is comprised of two distinct offices. One is responsible for education and outreach (e.g., promoting a positive sport culture, seeking to prevent athlete abuse, and raising awareness of such issues).²²¹ The other office is charged with investigating and resolving alleged violations of the SafeSport Code for the US Olympic

211. Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, 132 Stat. 218 (2018) (codified at scattered sections of 18, 34, and 36 U.S.C.) (stating that the purpose of the act is to "prevent the sexual abuse of minors and amateur athletes by requiring the prompt reporting of sexual abuse to law enforcement authorities, and for other purposes").

212. *Id.*

213. See Weston, *supra* note 210, at 438 (explaining the formation of the SafeSport program).

214. Pfohl Testimony, *supra* note 50; Weston, *supra* note 210, at 456.

215. Pfohl Testimony, *supra* note 50.

216. U.S. CTR. FOR SAFESPORT, SAFESPORT CODE FOR THE U.S. OLYMPIC AND PARALYMPIC MOVEMENT 1 (2017) [hereinafter SAFESPORT CODE], <https://77media.blob.core.windows.net/uscss/1488581091937.2017-03-03---safesport-code---final.pdf> [<https://perma.cc/BJD3-WNAK>].

217. U.S. Center for SafeSport, USA GYMNASTICS, <https://usagym.org/pages/education/safesport/center.html> [<https://perma.cc/6VHL-XP8F>] (last visited Mar. 27, 2018); see Press Release, U.S. Ctr. for SafeSport, The U.S. Center for SafeSport Opens (Mar. 23, 2017) [hereinafter SafeSport Press Release], <https://safesport.org/files/index/category/press-releases> [<https://perma.cc/H9C8-HUX3>].

218. Pfohl Testimony, *supra* note 50.

219. See *id.*

220. See SafeSport Press Release, *supra* note 217.

221. See *What We Do*, SAFESPORT, <https://safesport.org/what-we-do> [<https://perma.cc/5FPJ-JRFA>] (last visited Mar. 27, 2018).

and Paralympic Movements.²²² The Code's authority is derived from the USOC bylaws,²²³ which require all forty-seven NGBs to adhere to the SafeSport Code. Individuals covered by the SafeSport Code include members of NGBs and those who are authorized to assume a position of authority over, or have frequent contact with, athletes.²²⁴ Covered athletes are those who are members of an NGB.²²⁵ The SafeSport Code prohibits sexual misconduct, child sexual abuse, emotional or physical misconduct, and retaliation.²²⁶ The SafeSport Code also provides that the US Center for SafeSport's Response and Resolution Office has the exclusive authority to investigate and resolve allegations of sexual misconduct and related prohibited behavior, so that neither the USOC nor the relevant NGB will conduct their own investigations in such cases.²²⁷ Thus, independent SafeSport investigators will examine complaints of abuse, and SafeSport will issue findings. The USOC requires all NGBs to enforce the appropriate sanction under the Code.²²⁸ This sanction must be respected throughout US Olympic Movement sport.²²⁹ The SafeSport Code does not displace or otherwise restrict an individual's recourse under federal or state law.²³⁰

The SafeSport program is an important step toward protecting Olympic Movement athletes in the United States. However, it is too early to determine whether the SafeSport initiative will be effective. Congressional testimony by SafeSport's director and CEO Shellie Pfohl highlighted the fact that funding will be necessary to achieve the program's full promise.²³¹ SafeSport's website reflects this

222. *Id.*; see *SafeSport*, USA ARCHERY, <https://www.teamusa.org/usa-archery/about-usa-archery/usa-archery-safesport> (last visited Mar. 16, 2018).

223. BYLAWS OF THE UNITED STATES OLYMPIC COMMITTEE, § 8.7, at 31–32 (2017) [hereinafter USOC BYLAWS] (“NGB and PSO Membership Requirements”); SAFESPORT CODE, *supra* note 216, at 1.

224. SAFESPORT CODE, *supra* note 216, at 3; see *Structure*, TEAM USA, <https://www.teamusa.org/About-the-USOC/Inside-the-USOC/Olympic-Movement/Structure> [<https://perma.cc/W38T-PXX8>] (last visited Mar. 27, 2018).

225. SAFESPORT CODE, *supra* note 216, at 1.

226. *Id.* at 8–9.

227. *Id.* at 9; see USOC BYLAWS, *supra* note 223, § 9.12 (“A decision concerning a safe sport rule violation adjudicated by the independent safe sport organization designated by the corporation to investigate and resolve safe sport violations shall not be reviewable through, or the subject of, these complaint procedures.”).

228. See SAFESPORT CODE, *supra* note 216, at 9; see also U.S. OLYMPIC COMM., NGB ATHLETE SAFETY POLICY (2018).

229. SAFESPORT CODE, *supra* note 216, at 9.

230. *Id.* at 1.

231. Pfohl Testimony, *supra* note 50. Indeed, it was lack of sufficient funding that delayed SafeSport's opening. The *Washington Post* reported that while SafeSport was originally

uncertainty over funding, with a donation link prominently featured, and a statement that a “tax-deductible donation will help end . . . abuse in sport.”²³² If SafeSport’s leadership is forced to focus on fundraising to support its work, the initiative’s effectiveness could be jeopardized. Instead, Congress should provide SafeSport with grants, as it has with the USADA,²³³ to support its work. Congress should monitor SafeSport’s outcomes, and if the program establishes itself as a truly independent entity that secures measurable results, as the USADA has, Congress should continue to support it as a key feature of the US Olympic Movement.

A second change that would contribute to athletes’ health and well-being is amending the Amateur Sports Act to set uniform requirements on NGBs for preventing and managing concussions. Currently, concussion management is delegated to NGBs,²³⁴ which loosely follow the guidance from their sport’s IFs.²³⁵ The IOC Medical and Scientific Commission also references a 2013 Consensus Statement on sport concussions.²³⁶

While it is clear that NGBs are trying to promote awareness and better management of concussions, much more can be done to protect athletes. For instance, during the 2015 Women’s World Cup, viewers saw the terrifying collision between German player Alexandra Popp and US player Morgan Brian.²³⁷ Brian remained down on the field for several minutes and appeared “truly dazed” when she got up;

scheduled to be operational in 2015, fundraising difficulties delayed the launch until 2017. Hobson & Rich, *supra* note 2.

232. *Donate*, SAFESPORT, <https://safesport.org/donate> [<https://perma.cc/Z53P-7N86>] (last visited Mar. 27, 2018).

233. *See* 21 U.S.C. § 2003 (2012).

234. For instance, USA Diving as of 2016 required its coaches to complete mandatory concussion training. *See Concussion Education*, USA DIVING, <https://www.teamusa.org/usa-diving/resources/concussion-education> [<https://perma.cc/J67W-VRCV>] (last visited Mar. 27, 2018). USA Volleyball provides a list of resources aimed at promoting awareness and referencing CDC guidelines on concussion management. *See Health and Safety*, USA VOLLEYBALL, <https://www.teamusa.org/USA-Volleyball/Education/Health-and-Safety> [<https://perma.cc/4X5D-KQ3C>] (last visited Mar. 27, 2018).

235. *See* Paul McCrory et al., *Consensus Statement on Concussion in Sport: The 4th International Conference on Concussion in Sport Held in Zurich, November 2012*, 47 BRIT. J. SPORTS MED. 250, 255 (2013) (stating that sport federations were taking measures to respond to the issue of sport concussions).

236. *Medical and Scientific Commission*, INT’L OLYMPIC COMM., <https://www.olympic.org/medical-and-scientific-commission> [<https://perma.cc/3GXE-A3M2>] (last visited Mar. 27, 2018); *see* McCrory et al., *supra* note 235, at 255.

237. Jeré Longman, *After Heads Bang, Interests Collide for FIFA*, N.Y. TIMES (July 1, 2015), <https://www.nytimes.com/2015/07/02/sports/soccer/womens-world-cup-semifinal-injuries-morgan-brian-alexandra-popp.html> [<https://perma.cc/XHY4-N27M>].

nevertheless, she was back in the game shortly thereafter.²³⁸ While US teams must play by IF sporting rules in international competitions such as the World Cup, Congress should consider whether athlete health and safety can be better safeguarded by not simply deferring to IFs and NGBs.

Congress should therefore consider expanding current bills proposing federal standards for concussion management to include the Olympic Movement, or it should follow the lead of the fifty states that have adopted concussion management guidelines, and continue to adopt further reforms to protect athletes.²³⁹ In youth, amateur sport, legislation at the state level mandates a relatively uniform approach to concussions.²⁴⁰ All states require removal from play and a return only after proper medical clearance.²⁴¹ While these laws might not go far enough in preventing the initial injury, they represent an important change in the approach to regulating sport and will help contribute to changing norms around management of sport-related concussions.²⁴² Moreover, due to the coverage of state concussion management statutes, it is possible that some athletes who are members of NGBs and participating at the grassroots level will be covered by the state provisions. However, the statutes do not reach athletes beyond high school²⁴³ and thus do not apply to many elite, Olympic athletes. In addition, whether or not an athlete is eighteen, providing clear standards for concussion management through NGBs—and not simply promoting “awareness”—has a better likelihood of protecting athletes. NGBs most closely communicate with their coaches and athletes, and NGBs directly control coaches’ and athletes’ access to participation in sanctioned competition. Establishing a uniform policy also has the benefit of communicating with greater clarity than a patchwork of approaches. Finally, a uniform policy would ensure greater fairness for athletes in the management of concussions. Athletes should not have more or less attention paid to sport concussions based on the sport they play and

238. L.V. Anderson, *The USA-Germany Semifinal Just Proved Why FIFA Needs a Better Concussion Protocol*, SLATE (June 30, 2015, 8:33 PM), http://www.slate.com/blogs/the_spot/2015/06/30/usa_germany_world_cup_semifinal_collision_between_alexandra_popp_and_morgan.html [<https://perma.cc/MJK7-3W8E>].

239. Lowrey, *supra* note 51, at 63.

240. *Id.* at 64.

241. *Id.*

242. *Id.* at 64–65.

243. See NETWORK FOR PUB. HEALTH LAW, SUMMARY MATRIX OF STATE LAWS ADDRESSING CONCUSSIONS IN YOUTH SPORTS (2017), https://www.networkforphl.org/_asset/7xwh09/StateLawsTableConcussionsFINAL.pdf available at <https://www.networkforphl.org> [<https://perma.cc/K8V5-SKGM>].

their NGB's willingness to adopt and enforce appropriate concussion management policies.

Finally, to effectuate better concussion management and promote overall health and well-being of athletes, Congress should consider directing the USOC to set clear standards for coaches and sports medicine personnel. The Amateur Sports Act should therefore also be amended to require baseline standards for Olympic and amateur sport relating to sports medicine and coaching. While much has been written about the so-called "professionalization" of youth sport,²⁴⁴ there has not been a corresponding professionalization of coaching in terms of required certifications or education both in the training of athletes specific to the particular sport and athlete health and well-being more generally.

Similarly, Congress should consider requiring the USOC and NGBs to maintain clearer standards for the medical professionals that care for Team USA. "Sports medicine" was part of the concept for the US Olympic program that was articulated in the original Amateur Sports Act.²⁴⁵ The USOC Sports Medicine Division was instituted in part to be a central coordinating body for sports medicine knowledge and for the purpose of disseminating information that would benefit athletes and overall US athletic performance and society at large.²⁴⁶ As conceived, the USOC Sports Medicine Division seeks to develop programs in basic science, exercise physiology, biomechanics, sports psychology, nutrition, medical care, and athlete training.²⁴⁷ In this conception, "sports medicine" is an umbrella term referring to everything from athlete nutrition and mental preparedness to the provision of actual clinical medical services. Health care providers ranging from chiropractors and family physicians to orthopedic surgeons claim to practice in this area.²⁴⁸

Thus, while the concept of "sports medicine" certainly involves medical professionals, the variety of individuals who can claim to

244. See, e.g., Frank L. Smoll, *The "Professionalization" of Youth Sports*, PSYCHOL. TODAY (July 23, 2017), <https://www.psychologytoday.com/blog/coaching-and-parenting-young-athletes/201707/the-professionalization-youth-sports> [<https://perma.cc/5PFZ-L2NS>].

245. See 124 Cong. Rec. S31,666 (daily ed. Sept. 26, 1978) ("The role of sports medicine has become increasingly important in the total development of well-conceived amateur sports programs.").

246. *Id.*

247. *Id.*

248. See Matthew J. Mitten, *Team Physicians as Co-Employees: A Prescription That Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 ST. LOUIS U. L.J. 211, 211 (2005) (mentioning orthopedic surgeons and internal medicine physicians); *About*, ACBSP, <http://acbsp.com/about> [<https://perma.cc/N7PZ-5MMG>] (last visited Mar. 27, 2018); *About the American Osteopathic Academy of Sports Medicine (AOASM)*, AOASM, <http://www.aoasm.org/about/> [<https://perma.cc/XPG3-8WY9>] (last visited Mar. 27, 2018).

practice “sports medicine”—and the lack of clear definitions and standards for what sports medicine entails—leaves athletes vulnerable to unqualified and, in some cases, dangerous individuals providing purported treatment that is either not beneficial or actually harmful. Using the USA Gymnastics scandal as an example, Nassar has asserted that he did not sexually abuse his accusers but was instead providing legitimate sports medicine care.²⁴⁹ Amending the Amateur Sports Act can therefore ensure better treatment of athletes by requiring those who work closest with athletes to meet consistent standards.

2. Adopt Provisions to Protect Whistleblowers

A second important change to the Amateur Sports Act would be adding protections for whistleblowers.²⁵⁰ The importance of this issue came to light in the year preceding the 2016 Rio de Janeiro Olympic Games. At that time, WADA released a report on an independent investigation into allegations of widespread, state-sponsored doping in Russian sport. The report concluded “beyond a reasonable doubt” that the Russian government orchestrated an extensive program of athlete doping and positive-test cover-ups in at least thirty sports.²⁵¹ Evidence provided by Yuliya Stepanova, a Russian track-and-field athlete; her husband and former Russian anti-doping official, Vitaly Stepanov; and Grigory Rodchenkov, a former director of Russia’s anti-doping lab,²⁵² was critical to the effort to uncover the scope of the Russian Olympic program’s cheating. As a result of their revelations,

249. Lauren Green, *Could Lawrence Nassar Have Been Prevented from Assaulting Dozens of Athletes?*, SPORTS ILLUSTRATED (Mar. 3, 2017), <https://www.si.com/more-sports/2017/03/03/scorecard-protect-and-serve-lawrence-nassar-assault> [<https://perma.cc/7C6F-GQTS>].

250. NANCY M. MODESITT, JANIE F. SCHULMAN & DANIEL P. WESTMAN, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* 1–33 (3d ed. 2015).

251. RICHARD H. McLAREN, *THE INDEPENDENT PERSON* 2ND REPORT 7 (2016), https://www.wada-ama.org/sites/default/files/resources/files/mclaren_report_part_ii_2.pdf [<https://perma.cc/BJ3T-YYHS>]; Rebecca R. Ruiz, *Report Shows Vast Reach of Russian Doping: 1,000 Athletes, 30 Sports*, N.Y. TIMES (Dec. 9, 2016), <https://www.nytimes.com/2016/12/09/sports/russia-doping-mclaren-report.html?action=click&contentCollection=Olympics&module=RelatedCoverage®ion=EndOfArticle&pgtype=article> [<https://perma.cc/MF7U-FUBW>].

252. Rachel Axon, *Russian Olympic Doping Whistleblower Drops Her Appeal to the IOC*, USA TODAY (Aug. 5, 2016, 2:09 PM), <https://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/05/whistleblower-yuliya-stepanova-russia-doping/88299724/> [<https://perma.cc/6KNM-K68X>]; Rachel Axon, *Russian Whistleblower Raises Concerns Country May Elude Punishment for Doping*, USA TODAY (Sept. 22, 2017, 6:00 PM), <https://www.usatoday.com/story/sports/olympics/2017/09/22/russian-whistleblower-grigory-rodchenkov-concerns-country-may-elude-punishment-doping/693720001/> [<https://perma.cc/EK53-9C25>].

all three were forced to flee Russia, and Stepanova lost the ability to compete as a member of the Russian team.²⁵³

In the report exposing the doping culture in Russian track and field, an independent commission noted that WADA did not have adequate protections in place to encourage and support whistleblowers.²⁵⁴ In addition, WADA recommended that the International Association of Athletics Federations (IAAF) and IOC recognize Stepanova and Stepanov's unprecedented acts by offering them the necessary support to mitigate the harm to them as a result of their revelations.²⁵⁵ Although the IAAF cleared Stepanova to compete independently from the Russian team, the IOC refused to allow her to compete in the Games.²⁵⁶

The lessons from the Russian doping scandal suggest an additional area for reform in the US Olympic program. In particular, the revelations of Russian doping and resulting damage to Stepanova's track-and-field career demonstrate that it is often only through the efforts of a whistleblower that the integrity of sport can be preserved. Thus, even in the US Olympic program, wrongdoing has happened and will likely continue to happen, and in these cases, credible evidence is most likely to come from those athletes and officials who are on the inside. Without rules to incentivize and protect these crucial sources, it is unlikely that they will come forward since the personal costs can be great. Importantly, whistleblowing is not simply about doping. The allegations involving Nassar's abuse of numerous gymnasts, including some who were at the elite level, show

253. Rachel Axon, *Russian Olympic Ban Is Bittersweet for Whistleblower Who Provided Doping Evidence*, USA TODAY (June 17, 2016, 10:37 PM), <https://www.usatoday.com/story/sports/olympics/rio-2016/2016/06/17/iaaf-decision-opens-door-russian-whistleblower-compete/86070268/> [<https://perma.cc/HLQ5-BR52>]; Ben Bloom, *How the Stepanov Family Risked Their Lives to Expose Russia's Doping Regime*, TELEGRAPH (Dec. 29, 2015, 9:24 PM), <https://www.npr.org/2017/12/27/573870686/russian-doping-whistleblower-says-he-fears-for-his-life> [<https://perma.cc/5R33-8K6P>]; Robert Siegel, *Russian Doping Whistleblower Says He Fears for His Life*, NPR (Dec. 27, 2017, 4:33 PM), <https://www.npr.org/2017/12/27/573870686/russian-doping-whistleblower-says-he-fears-for-his-life> [<https://perma.cc/D6VV-997T>].

254. See RICHARD W. POUND ET AL., THE INDEPENDENT COMMISSION REPORT # 1: FINAL REPORT 8, 40, 323 (2015), https://www.wada-ama.org/sites/default/files/resources/files/wada_independent_commission_report_1_en.pdf [<https://perma.cc/NT62-RJ4K>].

255. See WADA *Reiterates Its Support for IAAF's Decision to Maintain Russian Athletics Federation Suspension*, WADA (June 22, 2016) [hereinafter *WADA Reiterates Its Support for IAAF's Decision*], <https://www.wada-ama.org/en/media/news/2016-06/wada-reiterates-its-support-for-iaafs-decision-to-maintain-russian-athletics> [<https://perma.cc/C2EA-D2F3>].

256. Axon, *supra* note 253; Owen Gibson, *Whistleblower Yuliya Stepanova Hits out at IOC After Being Banned from Rio*, GUARDIAN (July 25, 2016, 3:57 PM), <https://www.theguardian.com/sport/2016/jul/25/yuliya-stepanova-whistleblower-rio-olympics-ban-ioc> [<https://perma.cc/956B-PCY9>]; WADA *Reiterates Its Support for IAAF's Decision to Maintain Russian Athletics Federation Suspension*, *supra* note 255.

that the culture of abuse could exist in part because the gymnasts were afraid to report Nassar's behavior for fear of losing their place on the team.²⁵⁷ Amending the Amateur Sports Act to provide explicit protections for whistleblowers would send a strong message and provide clear protections for those who come forward to protect the integrity of the US Olympic Movement.

This is not to say that the US Olympic Movement has turned a blind eye to the value of whistleblowers. The recent legislation adopting SafeSport reforms contains an anti-retaliation provision.²⁵⁸ The USADA operates a Play Clean Tip Center where anonymous sources may report potential anti-doping rule violations.²⁵⁹ The USOC has a code of conduct and an ethics committee that is responsible for managing ethics complaints.²⁶⁰ In addition, it is possible that whistleblowers in the US Olympic program could be protected by various laws aimed generally at whistleblowers.²⁶¹ Moreover, dispute resolution procedures administered through the USOC and NGBs may also provide a measure of protection. However, relying on the potential applicability of piecemeal protections and administrative hearings will not serve the purpose of encouraging whistleblowers to come forward and may leave them exposed to retaliation if they do. A better approach is to require, through the Amateur Sports Act, that the USOC and NGBs provide meaningful protections for those who blow the whistle on wrongdoing, whether it involves doping, athlete abuse, or any other issue.

3. Incorporate Additional Gender Equity Standards

The past year also highlighted the need for the US Olympic Movement to fully commit to principles of gender equity, especially with regard to athlete pay. In 1978, when Congress enacted the Amateur Sports Act, Title IX of the Civil Rights Act had only been on the books for six years, and the regulations applying Title IX in the

257. Sally Jenkins, *USA Gymnastics Allowed Larry Nassar to Prey upon Innocent Victims. Congress Must Investigate.*, WASH. POST (Jan. 24, 2018), https://www.washingtonpost.com/sports/olympics/usa-gymnastics-allowed-larry-nassar-to-prey-upon-innocent-victims-congress-must-investigate/2018/01/24/0ff7a7c4-0129-11e8-8acf-ad2991367d9d_story.html?utm_term=.e781582807fa [<https://perma.cc/QCG5-4NL9>].

258. Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, § 202(a), 132 Stat. 318 (2018) (codified at 36 U.S.C. § 220542(a)(2)(D) (2018)).

259. *Play Clean Tip Center*, U.S. ANTI-DOPING AGENCY, <https://www.usada.org/athletes/playclean/> [<https://perma.cc/V4KZ-AK4K>] (last visited Mar. 27, 2018).

260. USOC BYLAWS, *supra* note 223, §§ 5.5, 5.5.3, at 22–23.

261. MODESITT, SCHULMAN & WESTMAN, *supra* note 250, at 1-34, 1-35.

sports context had only been in effect for three.²⁶² The Amateur Sports Act reflected this early move for gender equity in sport by stating that one of the purposes of the USOC is to “encourage and provide assistance to amateur athletic activities for women.”²⁶³ This charge continues to be relevant. While sport participation for women has increased dramatically since 1978,²⁶⁴ more still needs to be done to secure the benefits of sport for women and girls, especially in some communities. However, the increase in women’s participation in sport since 1978 has meant that the United States now has well-developed elite programs in a variety of sports,²⁶⁵ and Congress should require that these women athletes are treated equitably.

Title IX and its accompanying regulations define gender equity in athletics as both an obligation to create sport opportunities for women and girls and a requirement to provide equitable support to women and girls who participate.²⁶⁶ Title IX applies to educational programs that receive federal funding; it does not apply to the USOC or the US Olympic Movement.²⁶⁷ However, Title IX’s success is perhaps most visible in international athletics, as US women across a variety of sports have achieved enormous success.²⁶⁸ From this perspective, Title IX’s principles have provided an important payoff through the US Olympic Movement in that a greater number of female athletes and greater support for female athletics has meant,

262. See Susannah Carr, *Title IX: An Opportunity to Level the Olympic Playing Field*, 19 SETON HALL J. SPORTS & ENT. L. 149, 158–59 (2009).

263. 36 U.S.C. § 220503(12) (2012).

264. Carr, *supra* note 262, at 63.

265. See QUAD REPORT, *supra* note 1, at 3 (stating that US women won “more than half of Team USA’s medals at the Olympic and Paralympic Games”).

266. Koller, *supra* note 59, at 410–11.

267. 20 U.S.C. § 1681(a) (2012) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

268. *Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996) (“One need look no further than the impressive performances of our country’s women athletes in the 1996 Olympic Summer Games to see that Title IX has had a dramatic and positive impact on the capabilities of our women athletes, particularly in team sports. These Olympians represent the first full generation of women to grow up under the aegis of Title IX. The unprecedented success of these athletes is due, in no small measure, to Title IX’s beneficent effects on women’s sports What stimulated this remarkable change in the quality of women’s athletic competition was not a sudden, anomalous upsurge in women’s interest in sports, but the enforcement of Title IX[.]”); see *Hearing on the Amateur Sports Act*, *supra* note 19, at 12 (statement of Norma V. Cantú, Assistant Secretary for Civil Rights, United States Department of Education) (“Senator Hatch has perhaps best captured the essence of the meaning and promise of Title IX. In 1984, on the Senate floor, he observed that there were few, if any, Senators who did not want ‘Title IX implemented so as to continue to encourage women throughout America to develop into Olympic athletes’”); QUAD REPORT, *supra* note 1, at 3.

predictably, more and better elite women athletes. The USOC has harnessed this increase in women's sport participation through greater participation opportunities for women in the US Olympic program. For instance, in the 2016 Rio de Janeiro Olympic Games, Team USA was comprised of 291 women and 263 men.²⁶⁹ It is clear, then, that from the perspective of *participation opportunities*, the US Olympic Movement is living up to the ideals expressed through Title IX.

However, for the women in elite Olympic Movement sport, participation is no longer the issue. Instead, it is in some cases equitable support and compensation. For instance, in 2016, five members of the women's US national soccer team brought a claim against the US Soccer Federation, alleging that they were discriminated against on the basis of gender in violation of the Equal Pay Act and Title VII of the Civil Rights Act.²⁷⁰ In their complaint, the women detailed the ways in which their pay and benefits were less generous than that provided to their male peers.²⁷¹ The players also asserted that the lower pay and unequal treatment occurred despite the fact that the women's team has been far more successful than the men's.²⁷²

Similarly, the women's US national hockey team announced in 2017 that they would boycott the upcoming world championships if USA Hockey did not agree to increase their pay and benefits to be more in line with what the men enjoyed.²⁷³ USA Hockey came to an agreement with the team, pledging to provide increased compensation and benefits similar to the men's program.²⁷⁴

269. Greg Myre, *U.S. Women Are the Biggest Winners at Rio Olympics*, NPR (Aug. 21, 2016, 6:11 PM), <https://www.npr.org/sections/thetorch/2016/08/21/490818961/u-s-women-are-the-biggest-winners-in-rio-olympics> [<https://perma.cc/FH45-JZ6C>].

270. Gabriella Levine, *ANALYSIS: The Law and Legal Standing of U.S. Women's National Team EEOC Complaint, Explained*, EXCELLE SPORTS (Apr. 1, 2016), <http://www.excellesports.com/news/analysis-unique-legal-standing-underpinning-u-s-womens-national-team-eeoc-complaint/> [<https://perma.cc/8X5M-2BQE>].

271. Andrew Das, *Top Female Players Accuse U.S. Soccer of Wage Discrimination*, N.Y. TIMES (Mar. 31, 2016), <https://www.nytimes.com/2016/04/01/sports/soccer/uswnt-us-women-carli-lloyd-alex-morgan-hope-solo-complain.html?mtrref=www.google.com> [<https://perma.cc/Z3Q3-EM7R>].

272. *Id.*

273. Seth Berkman, *U.S. Women's Team Strikes a Deal with U.S.A. Hockey*, N.Y. TIMES (Mar. 28, 2017), <https://www.nytimes.com/2017/03/28/sports/hockey/usa-hockey-uswnt-boycott.html> [<https://perma.cc/6JWJ-A8WJ>].

274. *Id.*

While both cases ultimately settled,²⁷⁵ the outcome of any legal resolution was far from clear. For instance, the US Soccer Federation may have argued successfully that it is not a covered employer under the Equal Pay Act or that the players are not covered employees. It may also have succeeded by asserting that the pay differential was due to “any other factor other than sex.”²⁷⁶ In addition, the analysis would have been complicated by the fact that unlike most jobs, elite athletics are deliberately sex segregated. Finally, questions around whether the women were operating under a collective bargaining agreement likely also would have had an impact on the case.

These issues could be sidestepped by Congress adding a provision to the Amateur Sports Act to require that NGBs make a stronger commitment to gender equity. Currently, the Amateur Sports Act requires the USOC to “encourage and provide assistance to” women’s amateur athletics.²⁷⁷ The statute also requires NGBs to “provide equitable support and encouragement for participation by women where separate programs for male and female athletes are conducted on a national basis.”²⁷⁸ While this provision arguably covers matters such as athlete pay, it also appears aimed at supporting and encouraging “participation.” Indeed, the USOC seems to interpret its effectiveness in providing support to women with reference to the *success* of the women in the Olympic program. The USOC states in its Quad Report to Congress that “[e]quality was once again at the forefront, with American women winning more than half of Team USA’s medals at the Olympic and Paralympic Games.”²⁷⁹ While medal winning can be a measure of how robust the USOC and NGBs’ support of women’s athletics is, the examples of the women’s national soccer and hockey teams demonstrate that medal winning by women does not necessarily correlate with equitable treatment.

Thus, while sport participation for women and girls at the grassroots level is a persistent issue that must continue to be tackled, it is not a pressing issue in elite sport. Accordingly, this provision should be amended to clarify that the “support” Congress intends to be equitable is not just in the development of participation opportunities,

275. See Colin Dwyer, *In ‘Important Step,’ U.S. Women’s Soccer Team Reaches New Labor Deal*, NPR (Apr. 6, 2017, 9:50 AM), <https://www.npr.org/sections/thetwo-way/2017/04/06/522843140/in-important-step-u-s-womens-soccer-team-reaches-new-labor-deal> [https://perma.cc/VH7T-U66D].

276. See 29 U.S.C. § 206(d)(1) (2012).

277. 36 U.S.C. § 220503(12) (2012).

278. *Id.* § 220524(6).

279. QUAD REPORT, *supra* note 1, at 3 (noting that the US women athletes also enjoyed “unprecedented success”).

but also in the actual pay and other benefits that Olympic Movement athletes enjoy.

B. Develop a True Amateur Sports Act

In addition to amending the Amateur Sports Act to promote elite athlete health and well-being, Congress should look to the work of the President's Commission, and subsequent congressional testimony on the importance of grassroots sport, and seek to make an impact on how the United States provides these necessary opportunities. Building a twenty-first-century amateur sports act can therefore draw on the ideals of the past that were articulated but never fully realized.

To do this, Congress should move away from the general view that staying out of sport is the best approach.²⁸⁰ Just as Congress has made targeted, important reforms with respect to Olympic Movement sport, it can also contribute to solving the problems of grassroots amateur sport with measured, effective initiatives.²⁸¹ Moreover, while Congress should aim to address grassroots sport, it should not do so simply to serve the US Olympic program.

Since Congress originally enacted the Amateur Sports Act, it has become apparent that developing Olympic talent and grassroots opportunities are two different (albeit connected) missions, and the USOC has made clear that to develop broad-based participation

280. See *Hearing on the Amateur Sports Act*, *supra* note 19, at 90 (statement of Thomas McMillen, Co-Chair, President's Council on Physical Fitness and Sports).

281. It could be argued that Congress should not regulate in the area of grassroots youth sport and should instead simply focus on the Olympic Movement because the Olympic Movement has international implications and requires a centralized approach. While it is true that Congress essentially must provide at least some direction for the US Olympic Movement, providing centralized leadership in the area of youth sport is arguably as important. See *id.* at 91–92. First, Congress purported to do that when it originally enacted the Amateur Sports Act. See 36 U.S.C. § 220503. The findings of the President's Commission made a compelling case for a national policy agenda for amateur sport, and those findings are even more important today. See PRESIDENT'S COMM'N ON OLYMPIC SPORTS, *supra* note 18, at 27. In addition, much regulation of youth sport is done at the state level, through schools. See, e.g., PROJECT PLAY, ASPEN INST., STATE OF PLAY 2017: TRENDS AND DEVELOPMENTS 10 (2017), <https://www.aspeninstitute.org/publications/state-of-play-2017-trends-and-developments/> [<https://perma.cc/SW7M-BT8A>]. While the education-based model with state regulation has resulted in opportunities for many children through their schools, many more children do not have access to meaningful opportunities to participate. See *id.* at 2. This, combined with the childhood obesity epidemic and the known public health benefits of sport participation, underscores the importance of a national approach. This Article assumes, therefore, that the original premise behind the Amateur Sports Act is even more valid today and accordingly argues that Congress should take the next step to realize the Act's full promise.

opportunities, it needs additional resources.²⁸² The USOC certainly has not ignored grassroots sport. It has partnerships with the NCAA, community-based multisport organizations, and others.²⁸³ The USOC is also charged with developing grassroots sport opportunities for the Paralympic pipeline.²⁸⁴ Congress has not provided additional funding and support for such work²⁸⁵ and, as currently operated, the USOC has focused almost exclusively on using its resources to develop athletes with the best chance of winning Olympic medals.²⁸⁶ Its stated mission is “to support U.S. Olympic and Paralympic athletes in achieving sustained competitive excellence while demonstrating the values of the Olympic Movement, thereby inspiring all Americans.”²⁸⁷ It is only to the extent that “inspiring all Americans” can be interpreted as developing grassroots sport opportunities that the USOC’s mission is responsive to those provisions of the Amateur Sports Act that require as much. Thus, Congress has deferred to the USOC and its sponsors to determine that the USOC’s focus will be on medal winning and commercial rewards.²⁸⁸

Congress could of course require the USOC to do more in this regard. This is not the best approach. Continuing to combine the concepts of Olympic and amateur sport, and making a statutory gesture toward grassroots sport, is not likely to effect the needed change. The USOC is achieving its Olympic mission with great success, and requiring it to dilute its resources and efforts in support of a broader goal would likely have a negative impact on the Olympic program. Moreover, continuing to conflate Olympic and amateur

282. *Hearing on the Amateur Sports Act*, *supra* note 19, at 33 (statement of LeRoy T. Walker, President, United States Olympic Committee).

283. U.S. OLYMPIC COMM., *supra* note 108, at 13.

284. QUAD REPORT, *supra* note 1, at 18.

285. *Id.* (“Another significant focus of USOC support in 2013–16 was U.S. Paralympics. Despite government grants decreasing by nearly \$18 million from the previous quad, overall funding increased by close to \$1 million with the USOC directing almost \$19 million in additional funds to Paralympic athletes and programming.”).

286. *Id.* at 3, 18. The USOC’s mission is “[t]o support U.S. Olympic and Paralympic athletes in achieving sustained competitive excellence while demonstrating the values of the Olympic Movement, thereby inspiring all Americans.” USOC BYLAWS, *supra* note 223, § 2.1, at 5 (“Mission Statement”); U.S. OLYMPIC COMM., *supra* note 108, at 2. The USOC has reiterated that its mission is “sustained competitive excellence.” U.S. OLYMPIC COMM., *supra* note 108, at 3. To achieve this, the USOC states that it operates “in a culture of service to America’s elite athletes” supported by, among other things, “strategic funding.” *Id.* at 11. The USOC also reports that 80 percent of its expenditures—over \$700 million—went to athlete support and NGBs. QUAD REPORT, *supra* note 1, at 18. The USOC states that grants are “strategically allocated to give the greatest number of American athletes the opportunity to reach the podium using a results-driven resource-allocation process.” *Id.*

287. QUAD REPORT, *supra* note 1, at 1.

288. FARREY, *supra* note 46, at 188–91.

sport, even with additional statutory language requiring the USOC to make greater efforts toward grassroots youth sport, suffers from two significant limitations. First, it is likely that the USOC will continue on the same course, with a primary focus on elite sport. Second, making the USOC solely responsible for developing grassroots sport opportunities assumes that the value of nonelite, youth sport is as a feeder to the Olympic program instead of an end in itself. Congress should therefore move past the concept of the USOC having primary responsibility for amateur sport in the United States and simply acknowledge the USOC as the body responsible for elite, Olympic athletics and trim its statutory responsibilities to correspond to its true operation.

Just as Congress should not rely on the USOC to develop grassroots sport opportunities, it should not exclusively rely on schools and the private sector to provide them either.²⁸⁹ The 1976 report of the President's Commission explained the many "voids" in the amateur sport landscape and remarked that reliance on schools to provide sport opportunities did not always produce the best results.²⁹⁰ This is even more accurate today. As explained above, statistics show the alarming rates of inactivity among children.²⁹¹ Schools provide far less physical education than they used to, and childhood obesity is a significant public health concern. We also have a fuller understanding of the value of sport participation over both the short and long term.²⁹² As a result, unlike in 1978, when the most pressing amateur sport issue was access to competition for developing elite athletes, the most pressing amateur sport problem facing the United States today is simply physical literacy and access to sport. Congress should account for this new reality by taking steps to adopt a true amateur sports act.

The blueprint for true amateur sports legislation can be found in the approach used to enact the current Amateur Sports Act. The statute grew out of the recommendations of the President's Commission on Olympic Sports, which thoroughly studied the issue and made concrete proposals for reform.²⁹³ Similarly, next-generation

289. See *Hearing on the Amateur Sports Act*, *supra* note 19, at 91–92 (statement of Tom McMillen, Co-Chair, President's Council on Physical Fitness and Sports). And it cannot rely on states. See *id.*; Kelley & Carchia, *supra* note 47 (explaining that where a child lives "makes all the difference," as sport participation statistics for youth vary widely among states).

290. PRESIDENT'S COMM'N ON OLYMPIC SPORTS, *supra* note 18, at 27.

291. *Facts & Statistics*, *supra* note 52.

292. *Facts: Sports Activity and Children*, PROJECT PLAY, ASPEN INST., <https://www.aspenprojectplay.org/the-facts/> [<https://perma.cc/D6QK-3WEC>] (last visited Mar. 27, 2018).

293. *Olympic and Amateur Sports Act Amendments of 1998*, S. REP. NO. 105-325, at 1–2 (1998).

amateur sport legislation could be developed by stakeholders working together to create a blueprint for a new conception of amateur sport in the United States. Indeed, much of the work done by the President's Commission and themes emphasized during congressional testimony in the 1990s are still relevant today. Nonprofit groups such as the Aspen Institute's Project Play also have important data and innovative proposals for remaking our approach to youth sport.²⁹⁴ However, like the pre-1978 splintered approach to Olympic sport in the United States, an agenda and solutions would benefit from centralized leadership and greater coordination among the varying contexts in which sport opportunities may be accessed. It is in this way that Congress has a role to play by creating a public or private entity to tackle such work.

A new entity could be modeled off the creation of the USOC, the USADA, and now SafeSport. While all three are primarily intended to serve the US Olympic Movement, they illustrate that centralized coordination—with government support—can improve amateur sport. In working to create such an entity, Congress should consider reframing youth sport participation as a public health issue²⁹⁵ and should give serious consideration to the benefits of a national policy.²⁹⁶ In doing so, Congress could reallocate many of the general provisions found in the current version of the Amateur Sports Act requiring the USOC to develop grassroots sport opportunities to an entity created for just that purpose.

Beyond generally working to develop grassroots participation opportunities, a true amateur sports act could task an entity with focusing on the specific policy issues that work to depress participation. For instance, a true amateur sports act could put greater emphasis on adaptive and inclusive sport for individuals with disabilities. It could develop programs and partnerships to provide meaningful sport participation opportunities for individuals from economically disadvantaged backgrounds and in geographic areas with lagging sport participation. In addition, a new amateur sports act could charge an amateur sport entity with setting uniform standards in areas that are needed in amateur sport, such as standards for coaching and concussion management. Such an act

294. See, e.g., PROJECT PLAY, ASPEN INST., PHYSICAL LITERACY IN THE UNITED STATES: A MODEL, STRATEGIC PLAN, AND CALL TO ACTION 3 (2015), https://assets.aspeninstitute.org/content/uploads/files/content/docs/pubs/PhysicalLiteracy_AspenInstitute.pdf [<https://perma.cc/48X2-G6CM>]; PROJECT PLAY, *supra* note 281, at 2; PROJECT PLAY, *supra* note 16, at 3.

295. See PRESIDENT'S COMM'N ON OLYMPIC SPORTS, *supra* note 18, at 38 ("The management of amateur sports is accountable to the public[.]").

296. See *id.* at 38, 57.

could also charge the entity with gathering important data that can be used to make sport safer and more accessible. In short, a true amateur sports act would recognize that there is a public interest in amateur sport.²⁹⁷

IV. CONCLUSION

Congress demonstrated through the Amateur Sports Act and the structure of the US Olympic program that a largely private-sector, uniquely American style of Olympic sport could be a highly successful model for the world of elite, international sport. Medal counts have never been higher, and the Team USA brand is strong. However, now that it has amended the Amateur Sports Act to address abuse of athletes, Congress should once again seize the opportunity to make the United States a leader in Olympic and amateur sport. To do this, it should amend the Amateur Sports Act to enact additional provisions aimed at athlete health and wellness, including in the area of concussion management, coaching, and sports medicine. It should also seek to encourage and strengthen protections for whistleblowers who provide important information about wrongdoing in Olympic sport. And Congress should do more to strengthen the USOC and NGBs' commitment to gender equity in sport.

Perhaps most importantly, Congress should also further its instinct to improve amateur sport by taking steps to enact a true amateur sports act. The goal of such legislation should be to develop an agenda and empower an entity to focus on creating opportunities and removing barriers to sport participation for the millions of children who would benefit from sport.

297. *Id.* at 76, 103.